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95-959

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

640 BROADWAY RENAISSANCE CO.,

Petitioner,

vs.

JOHN EISNER, *et al.* and 15 Other Cases Consolidated for Purposes of a Joint Appeal,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Judicial Department

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the retroactive and involuntary application of the "Loft Laws" to building owner, result in an unconstitutional confiscation or taking, denial of due process, impairment of contracts, or unconstitutional bill of attainder or *ex post facto* law, or deny equal protection to building owner, where the statutory scheme retroactively forfeited and seized Plaintiff's rent collections for more than four years?

2. Does the legislature have constitutional power to totally destroy the bargained-for lease rights of the building owner and impose, retroactively, upon a specific group of pre-selected persons, vastly greater rights and economic powers than were in the bargained-for, freely-entered into leaseholds, and to convert short-term leaseholds into essentially lifetime tenancies - after legislatively forfeiting many years of rent collection and transferring such monies - retroactively - to former tenants and/or to unauthorized successors and assigns?

3. Is there any constitutional justification for a punitive seizure of the use and occupancy and long-term control of Owner's real estate, and the forfeiture of more than four years rent, where the pre-enactment penalty for such violation of the zoning laws, was fines of $500-$1,000 under §304 of the M.D.L.?

4. Where the solely retroactive legislation, impossible to avoid after "designation", has the direct, proximate and actual effect of bankrupting Owner, retroactively seizing its property rights to collect rent (thus making it impossible to comply with the legislative mandates) and subjects Owner to continuing civil and criminal penalties, and grants long-term leaseholds in Owner's property, is there no protection under the Constitution from such retroactive and arbitrary legislative abuse?

5. Does the state legislature have the constitutional power to delegate legislative authority to the Mayor of the City of New York, over every aspect of ownership of real estate - all retroactively imposed, where the Mayor is granted the authority to delegate such "legislative authority" to a purported administrative body, consisting of nine members, with no statutorily defined qualifications, and where eight of the nine members of this so-called "Loft Board" have financial and legal status directly adverse to the interests of the actual building owner?

6. If the Loft Laws were a legitimate exercise of "police power", why didn't the legislature require removal of persons from buildings that were allegedly unsafe for residential use, instead of seizing control of the building and turning it over, gratuitously, to former tenants to occupy (with many years of no rent at all), according to their sole option?

7. What is the constitutional justification for the retroactive imposition of long-term, legislative forfeitures of Owner's rent collections under §§301-2 of the M.D.L., based upon the tenants' illegal and unlawful acts?

8. Under the Constitution, does a state/city statutory scheme have the power to retroactively require (under threat of criminal and civil penalties): (a) an existing office/loft building owner to apply for a discretionary "special permit" and zoning change, altered building application, and new residential certificate of occupancy; and (b) then totally reconstruct its building (with state-licensed former tenants holding over - still in occupancy, but paying no rent), and to permanently convert it into a multiple dwelling; and then, after years of approvals, applications and construction time (with unpaid use and occupancy for many years during the forced reconstruction process), require gratuitous grants to such former tenants (or strangers) of essentially permanent residential leaseholds, vastly more onerous than the leases that Owner signed?

LIST OF PARTIES

The Plaintiff is a privately held New York partnership, with no publicly owned interests.

All the names of the Defendants-Respondents in the sixteen consolidated cases are as follows: John Eisner, Maureen Eisner, "John" or "Jane" Tringale; Carlos Sosa; Joel Hinman, Philip Murphy, Scorched Earth Productions; Bob Rossiter, Loren Callaway, Leslie Holtan, Bobob Construction; Richard Yoder, Rosemary Yoder, "John" or "Jane" Menchin, "John" or "Jane" Erickson, "John" or "Jane" Zoar; Charles Searles, Kathleen Spicer; Donna Goodman, Donna Goodman d/b/a Broadway Design Studios, Inc.; Peter Clinton Neptune, "John" or "Jane" Garvin; Rina Peleg, Avri Ohana; Temple Smith, Phoebe Rentschler, "John" or "Jane" Richardson, "John" or "Jane" Wilson, "John" or "Jane" Bourne; Marie Paul Faque, Maripolitan Popular Objects Ltd., "John" Bertoglio; Nancy Hoffman, a/k/a/ Nancy Geisman, a/k/a Nancy Hoffman Geisman, Marcia Dalby and Linda Henneman; Andrea Vignoli, L. Berry, R. Berry; Juliet Holland, Liv Clausen, "John" or "Jane" Mesnick; Hannah Eshel, "John" or "Jane" Markee; Ruth Hollomon.

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OPINIONS BELOW

This is a petition for a writ of certiorari to the Appellate Division, Supreme Court, First Department, which affirmed an order of the Supreme Court, New York County dated November 15, 1993 (Lobis, J.) granting Defendants' motions for summary judgments and dismissed the complaint herein, and denying Plaintiff's cross motions to amend the complaint and for other relief. This is a consolidation of sixteen cases brought against the occupants of sixteen loft units located at the premises owned by Plaintiff for non- payment of rent or use and occupancy for more than a four year period ending in August 1992.

The First Department, Appellate Division, New York State Supreme Court affirmed this order on February 7, 1995. A motion for reargument was denied on April 27, 1995. The Plaintiff moved for an order granting leave to appeal to the New York Court of Appeals, which motion was denied by an order dated September 7, 1995. This petition for writ of certiorari is filed within ninety days of that date.

JURISDICTION OF THIS COURT

The order of the New York State of Appeals denying Plaintiff's motion for leave to appeal was entered on September 7, 1995.

This Petition was timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent text of the following provisions are set forth in the Appendix:
United States Constitution: Art. I, Sec. 10, cl.1
Fifth Amendment - Due Process Clause

- Takings Clause

Art. III, §§1 and 2;
Fourteenth Amendment

N.Y. Multiple Dwelling Law; Art.7-C,
§280-286; §§301-306; as amended

STATEMENT OF THE CASE

Plaintiff is the fee owner of a loft/office building in lower Manhattan, which brought these actions to collect rent or use and occupancy from sixteen occupants of its building, for more than a four year period. However, the New York Courts have held that the application of Art. 7C of the New York Multiple Dwelling Law (MDL) and related statutes ("Loft Laws", MDL §§280-287; §§301-6) (A-F); which retroactively and involuntarily designated its building as an "interim multiple dwelling", in April 1988, forfeited owner's fundamental property rights to collect rent, or use and occupancy, for its property, and Plaintiff could not collect any rent for this period of more than four years. The Loft Law "designation" turned a valuable real estate investment into property of nominal or negative value, forced the Plaintiff into Chapter 11 bankruptcy.

The Loft Laws "designation", stripped of verbiage, was solely dependent upon the willful illegal "residential" occupancy by tenants prior to the statute's passage.

In 1978, Owner bought a virtually vacant office/loft building located at 640 Broadway; constructed in 1895, it consists of nine stories. Owner substantially renovated and rented it to tenants under business "loft" leases. On June 21, 1982 (enactment date of "Loft Laws") 640 Broadway was a financially stable, fully rented building; and was in compliance with all substantial provisions of the building code, its existing certificate of occupancy for office/manufacturing use and the zoning regulations; however there were willful use violations solely by these

tenants - consisting of "residential" occupation (sleeping in building). Residential occupancy has always been illegal in this building because: (1) the certificate of occupancy mandates an office/manufacturing building; its permitted use is stores on the ground floor, and offices/manufacturing on the remaining 8 floors; (2) the building is located in an MI-5B Zone, which is a light manufacturing district under the Zoning Resolution ("ZR"), which expressly prohibited residential use. It constituted a misdemeanor for anyone to so occupy it (M.D.L. §304-1). Although "Joint living-work quarters for artists" are permitted in an MI5B Zone, such "artist" quarters were prohibited in 640 Broadway - unless and until an owner first obtained a special type of discretionary zoning variance known as a "special permit" (ZR 42-14(D)(1)(b)) and an approved alteration application (§284(1) (i) MDL) and a new residential certificate of occupancy. Obtaining these required permits and variances, retroactively imposed, and a new certificate of occupancy are lengthy and cumbersome processes which required the discretionary approval of several independent N.Y. City agencies, including City Planning Commission, Office of Economic Development, Department of Buildings, and the Board of Estimate[1] and major reconstruction of the building to meet "residential" requirements.

Although Owner did not want or need any:

(1) a discretionary "special permit" or
(2) an altered building application or
(3) a new certificate of occupancy,

Owner was forced under pain of criminal and civil penalties by the retroactive 1988 Loft Laws "designation" to hire architects and lawyers for this mandated "zoning variance" approval process, to rebuild the building to comply with, and to permanently convert from its existing

[1] Later abolished because it was held to be unconstitutional. *See Board of Estimate of City of New York v. Morris*, 109 S.Ct 1433 (1989)

office/ manufacturing use, to a currently illegal residential use. (M.D.L. §284).

It was uncontroverted that (a) 640 Broadway is not structurally suited to serve as a residential "multiple dwelling", and major structural changes would be required, including the installation of structural walls, hallways and doors, stairwells, staircases and exterior fire escapes, and installation of substantially new plumbing, heating, and electrical systems, and myriad other "residential" requirements[2]; and (b) up to Two Million Dollars ($2,000,000) would have to be expended to reconstruct this building to convert it into a multiple dwelling; compared to an arms-length purchase price in 1978, of Five Hundred Twenty-five Thousand Dollars ($525,000). Under existing city procedures, this would take years to do; the Loft Laws contemplate that this would take 3-5 years (See, §284(I)(D) M.D.L.) after (and if) this discretionary "special permit" variance was granted.

Although this retroactive statutory scheme is expressly dependent upon deliberate criminal violations by respondent tenants (during the retroactively specified period of April 1980-December 1981), of the certificate of occupancy, building codes and zoning laws prior to enactment, these former tenants and squatters are legislatively given rights under the "Loft Laws" to reside at the premises (at their option), virtually in perpetuity (after four or more years of paying no rent or use and occupancy at all), and convert short term leases - all expired more than ten years ago, into virtual lifetime tenancies (or longer). Not only must Owner gratuitously issue to a non-paying holdover tenant (or a stranger or transferee) a residential lease in accordance with the so-called "Emergency Tenant Protection Act of 1974" (governing modern apartment houses) which prescribed "residential" lease requires vastly increased owner

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[2] Also, Owner would have to forever comply with myriad city/state laws and regulations, which only apply to residential buildings, but not to office/manufacturing buildings.

obligations and services to be rendered, but in total contradiction of the lease with tenants (freely entered into when the building was vacant in 1979-80), Owner's rent is forfeited for more than four years, and the tenants live rent free; although the former tenants signed what was clearly a business lease which expressly prohibited residential use, which was in effect when the Loft Laws were passed in June, 1982, and which were for a definite term of no more than four or five years. By these laws, the Plaintiffs short term leases were retroactively converted to lifetime leaseholds, at tenants' sole option.

The retroactive Loft Laws also apply whether or not the Owner had any knowledge, actual or constructive, of the illegal residential use by tenants.

Each lease expressly represented and covenanted that the premises were to be used for specified office or manufacturing purposes, and not as residences were products of arms-length transactions, with well-educated, sophisticated adults, represented by attorneys; the proposed tenant then had a residence elsewhere, and tenants further represented that they would comply with all laws relating to the use of the premises[3]. The leases, dated 1979-80, all prior to Loft Law's enactment, stated that: "Tenant acknowledges that the Certificate of Occupancy, if any, for the building does not Permit residential Occupancy of the Premises."

Furthermore, tenants agreed in the leases to pay yearly rent increases based on Consumer Price Index adjustments; retroactively - the Loft Laws also destroyed this most important right of the owner to cost of living adjustments.

Furthermore, the tenants expressly agreed to accept the demised premises "as is" and covenanted that:

"Landlord will not be obligated to do any

[3] Other provisions, typical of non-residential leases, included the obligation of the tenants to pay for all interior repairs and all non-structural repairs; to replace all broken glass; and to pay for all utilities, and painting, decorating, and rubbish removal.

work or make any repairs, alterations, or improvements in or to the demised premises, except as specifically set forth in this lease" ¶56.

The Loft Laws also retroactively destroyed this most important contract right of Plaintiff.

These business leases provided for a short term; most of these leases expired in 1983 or 1984, and all expired before the Loft Board decision in 1988. The former tenants (or successors) forcibly held over beyond the expiration of the lease (claiming State-granted rights and immunities to reside on the premises indefinitely under the protection of the Loft Laws); the tenants violated the leases in virtually every way -including the failure to pay rent, rent escalations, or use and occupancy - with state-granted immunity. Since immediately after "designation" by the "Loft Board" in April 1988, none paid any rent or use and occupancy for more than four years while owner was required to provide all "residential" services to the tenants, while being legally precluded from collecting any rent. Owner was owed a minimum of $1,000,000. in rent and use and occupancy - calculated at the rates set forth in the expired leases; this is only part of the losses owner has suffered solely by reason of the retroactive Loft Board designation and the forced occupation of its building by state-mandated squatters (many of whom were never "tenants" of Owner. Defendants can not deny that as a direct and proximate result of "Loft Law" designation, plaintiff was forced to file a Chapter 11 petition on February 22, 1990 (S.D.N.Y. #90 B 1057 (TLB)) when the Loft Laws designation made it impossible for owner to collect any rent, and therefore impossible to pay its ordinary operating expenses, taxes and mortgage.

Because tenants slept in the building in 1980-81, (in deliberate violation of explicit lease representations and state/city laws) the state/city has now legislatively rewarded this retroactively selected group, by granting estates in Owner's premises, and granting lifetime lease-

holds. Even though the tenants deliberate residential occupancy was a misdemeanor (M.D.L.§304); these admitted misdemeanors by the tenants were the *sine qua non* of the retroactive "designation" of Owners building (§281-1 (iii) M.D.L.).

According to lengthy and contradictory "legislative findings" (MDL §280). the Loft Laws were enacted supposedly because of a "serious public emergency"; but in fact, were special interest legislation, retroactively enacted to appease a small but vocal group of politically active "artists", who were already illegally residing in the targeted buildings.

It was not denied that this group constituted certain specific tenants organizations, including Lower Manhattan Loft Tenants Association (LMLTA)[4] - and the Loft Laws were retroactively tailored to transfer to specific or identifiable persons, long-term control of these buildings, were solely retroactive in coverage, and do not apply to any buildings converted <u>after</u> the statutory enactment; the targeted buildings were retroactively labeled "interim multiple dwellings": defined as buildings in certain zoning districts which, at any time, had been used for manufacturing or commercial purposes,, and were residentially occupied by three or more, during the arbitrarily selected and retroactive period, April 1, 1980 to December 1, 1981 (MDL §281).

The Loft Laws also established an "administrative body" called the "Loft Board" (MDL §282) (the composition and administration of which are fundamentally un-American), which has usurped total control of Owner's buildings. The Loft Board consists of nine members who purportedly represent the "public", the "real estate industry", "loft residential tenants" and

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[4] Charles Delaney, a loft tenant and officer of LMLTA, was immediately appointed to the "Loft Board", remains as a member today, and votes on all matters affecting his own loft and lease status, and the rent he pays, if any, and the comprehensive regulations this self-serving body has promulgated. - All in total conflict with the lease provisions.

"loft manufacturing interests" and a "chairperson", but, in fact, are all political appointees (with no specific qualifications) of the Mayor of the City of New York, and serve at the mayor's pleasure, for such term and for such compensation as the Mayor may designate; (§282 MDL) The Mayor has appointed only one out of nine members to "represent" the "real estate industry".[5] Four of the nine are loft tenants - thereby controlling the "Loft Board" solely to their own benefit.

The Loft Law "designation" compelled Owner of this retroactively selected building to seek an unwanted and discretionary zoning variance (under pain of criminal and civil penalties), and then totally reconstruct its office/loft building - at huge expense - so as to make it legally, structurally and cosmetically suitable for residential use[6]. Failure to abide by the compliance schedule subjects Owner to criminal and civil sanctions (MDL §284 1-(ii); (§304). The costs of this mandatory zoning variance and major conversion project, are legislatively mandated to be paid by Owner in total violation of the written leases. Meanwhile, Owner was prohibited by the Loft Laws from collecting ANY rent or use and occupancy, or obtaining possession of the premises. (§302-1-(b)); (§283)

Furthermore, not only must Owner totally rebuild its building (with no current rent or use and occupancy being paid by the legislatively, and retroactively rewarded tenants) throughout an involuntary conversion process which will take many years (with occupants in unpaid possession), but Owner can not (*inter alia):* (a) recoup more than an arbitrary portion of the forced conversion

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[5] The "Loft Board", controlled by the tenants themselves, has the responsibility of determining which buildings are covered by the Loft Law, and has issued comprehensive regulations and rulings on every facet of "loft building" ownership, forced conversion and operation with the actual owner of the building no longer having any real voice in the operation of its building.

[6] Although Owner was required to comply with a rigid timetable (MDL §284 (I)) all these dates expired many years prior to the official "designation" of this building by the Loft Board in 1988.

costs; (b) obtain any interest or return upon the forced capital investment, and/or (c) obtain vacant possession of its premises.

Furthermore, the Loft Laws extinguished or contradicted every substantial provision of the leases for 640 Broadway, including three of the most important terms of any lease: (1) rent; (2) length of lease; (3) bargained for services; and also explicit provisions which obligated tenants to pay for all non-structural or interior repairs, and all required building alterations in the future, either during the term of the lease or any "extension" thereof, especially any arising from tenants use of the premises.[7] The Loft Laws do not define "compliance" under MDL §285(l), but New York courts have rigidly held that an owner must get a final certificate of occupancy as a fully converted residential building in order to collect any rent or use or occupancy. *County Dollar Corp. v. Douglas*, 556 N.Y.S.2d 533 (lst Dept. 1990); *902 Associates, Ltd. V. Total Creative Services*, 547 N.Y.S. 978 (App.Term 1989). There existed no statutory basis for avoiding compliance with the Loft Laws at any time after "designation",, nor at any future time.[8] Owner, declared an "interim multiple dwelling", is retroactively required (under criminal and civil penalties) to reconstruct its building to comply with residential

[7] The likelihood of recoupment of investment, or any return upon the huge forced investment, is greatly diminished by the fact that once a "residential" certificate of occupancy is issued, the building then becomes subject to the rent control provisions of the Emergency Tenant Protection Act of 1974 (MDL286(3)) which imposes strict limits on the amount of rent that may be charged and the tenant is granted an estate that can last for generations yet unborn, and is transferable to strangers, in complete nullification of the lease.

[8] As originally enacted, the Loft Laws contained a purported but illusory mechanism for exemptions from coverage for buildings for which compliance would cause an "unjustifiable" hardship" (not defined) (MDL §285(2)), but it expired by statute in June 1983, before any proceeding was ever commenced to designate this as a "Loft law" building; and those provisions lapsed 5 years prior to the "designation" by the "Loft Board", in 1988, of 640 Broadway.

housing standards (MDL §284). The Loft Laws' designation was the sole, direct and proximate cause of Owner's bankruptcy, since no rent was collectible from occupants using 90% of the building as state-licensed squatters; causing a default and foreclosure proceedings on the substantial first mortgage held by a national savings bank, and bankruptcy filing.

To be in "compliance" with the Loft Laws, Owner also had to apply for a "special permit" under the zoning law, an altered building application", and a building permit, and a new "residential" certificate of occupancy. The necessary government approvals of the numerous plans, permits and applications that must be filed and obtained (subject to numerous discretionary reviews by "Community Planning Boards", various city agencies and the Loft Board) would take years and forced reconstruction to residential use more years, thereafter, to accomplish; Owner is thus legislatively sentenced to both a long interim, and lifetime subsidization of its non-paying former tenants (or strangers) and here, also, total loss of its property rights for more than four years.[9]

In August, 1983, 24 persons who claimed to be illegally living at 640 Broadway filed an application with the Loft Board seeking a determination that 21 units in the building were covered by the Loft Laws. "Coverage" was contested by Owner. So-called "hearings" were conducted by various "hearing officers" (all employees of the City) between March and September 1985. Not one member of the Loft Board was present at any "hearing" to hear testimony or observe the demeanor of the witnesses; and it was uncontroverted that all members of the "Loft Board" serve at the whim and pleasure of the

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[9] To add injury to insult, the "artist" requirement was deleted by statute in 1987; §281(4)M.D.L, so now anyone who was there in 1980-81 (or their unauthorized successors in 1987), became the gratuitous beneficiary of an imposed long-term lease. This removed the major purported statutory "Justification" for the Loft Laws, the putpotyrf "emergency" need for "artists" housing.

Mayor, at salaries and for terms designated by the Mayor, and that virtually all of the "Loft Board" members had direct personal and financial interests adverse to Owner.[10]

Almost five years after the former tenants' application was filed, and almost six years after the enactment of the Loft Laws, the "Loft Board", in April 1988, determined that 640 Broadway was 'an "interim multiple dwelling" consisting of 20 units covered by the Loft Law[11] . Owner was ordered by the Loft Board to "register" the building. On the grounds that this mandatory "registration"[12] and a forced discretionary zoning variance and forcible residential conversion of the building was unconstitutional, Owner, in 1989, then in Chapter 11, brought an action pursuant to 42 U.S.C. §1983, seeking damages as well as a permanent injunction to prevent defendants from enforcing the Loft Laws and related statutes against Owner. The district court dismissed the complaint herein (*640 Broadway Renaissance Co. v. Cuomo*, 740 F.Sup.1023, *aff'd* 927 F.2d 593; *cert.den'd.* 111 S.Ct.2054, 114 L.E.2d 459 (1991), relying virtually *in toto*, on the Supreme Court dismissal for "want of a

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[10] Supposedly one of the nine Loft Board members "represents" the "real estate industry" (not even a loft building owner).

[11] The "hearings" were not "due process" hearings procedurally; including that *ex parte* meetings with tenants were secretly held; and staff members created biased evidentiary rules. Although no "Loft Board" member heard any testimony of witnesses - this was a triple "legislative" delegation of power: (1) from legislature to Mayor; (2) from Mayor to "Loft Board" and (3) from Loft Board to "Hearing Officer" (a City employee).

[12] "Registration" requires a forced surrender of fundamental property rights, including an affidavit swearing to provide all "residential" services to non-rent paying former tenants, whether yet defined or thereafter decreed; a delivery of all leases to Loft Board (whether strictly "commercial" or "residential") and other extortionate requirements.

substantial federal question," *of Spring Realty v. New York City Loft Board*, 487 N.Y.S.2d 973 (Sup.Ct. N.Y. Co. 1985), aff'd, 498 N.Y.S. 2d 241 (lst Dept. 1986) modf'd on other grounds, 69 N.Y.2d 657, 511 N.Y.S.2d 830, (1986), *app. dism'd*, 482 U.S. 911, (1987). However: (1) *Spring Realty* was dismissed because it was premature and speculative, and the building had not been "designated" by the Loft Board as an "interim multiple dwelling"; (2) unlike here, no buildings therein had been statutorily barred from collecting rent or yet suffered any actual monetary damage or bankruptcy; and (3) there was no case or controversy yet in existence, for purposes of Federal Court jurisdiction under Article III.

Plaintiff thereafter, under duress, "registered" the building with the Loft Board, and commenced this present action to collect more than four years rent for use and occupancy that was then due. The New York courts have dismissed Plaintiff's complaints on motion for summary judgment, and Plaintiff has no other judicial avenue to require the payment of such rents or use and occupancy; which, if upheld here, results in a forfeiture of Owner's property rights for that period and a legislatively mandated transfer of assets from Plaintiff to Defendants by this retroactive and legislative scheme.

REASONS FOR GRANTING THE WRIT

I -THE LOFT LAWS AS APPLIED HEREIN CONSTITUTE AN UNCONSTITUTIONAL IMPAIRMENT OF PRIVATE CONTRACTS UNDER ART. I, §10

"No State shall...pass any...Law impairing the Obligations of Contracts." The threshold inquiry is whether the law operates as a substantial impairment of the contractual relationship. *Allied Structural Steel Co., v. Spannaus*, 438 US 234. (1978) The severity of impairment

increases the level of scrutiny applied; substantial impact is undeniably present here. Leases, like other contracts;

> "enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." *Allied Structural*, 438 U.S. at 245.

The Loft Laws totally altered the short-term contractual relationship between tenants and Owner, and superimposed indefinite and crippling monetary and legal obligations on Owner, vastly beyond what Owner agreed to undertake. It is beyond dispute that the Loft Laws repudiated these leases in virtually every way, and were so retroactively designed (MDL §286). Under the Loft Laws former tenants have by State *fiat*: (a) extended their occupancy -most for more than ten (10) additional years already; (b) made unauthorized subdivisions; and sold, assigned and sublet (for windfall profits) their new property "rights" to unpaid occupancy; and (c) otherwise profiteered from Owner's property, by subletting for large sums, and still using the owner's premises rent-free thereby pocketing Plaintiff's rent monies and converting them to the tenants own use, and have become the virtual "owners" of lofts in Owner's building. Virtually every clause of the lease is cavalierly extinguished, including all provisions relating to paying rent, specified repairs and bargained-for services, and the term of the lease. With reckless disregard for the property rights of owner, the Loft Laws shifted economic burdens from tenant to Owner, and (1) transform the short-term commercial relationship (freely entered) into one for which they never bargained: a long time, subsidized residential estate; (2) abrogate virtually all contractual obligations of tenant; including the nullification of the Owner's rights to collect rent (MDL §301 & 302). The Loft Laws also compel Owner, at unconscionable expense, to

totally reconstruct the building into a multiple dwelling (MDL §284), without compensation; and notwithstanding that it is structurally unsuited for residential use, that it is contrary to the applicable zoning, and the building's existing certificate of occupancy. Owner must then (under compulsion of state criminal and civil penalties including imprisonment up to six months, (MDL §304) give the tenant an endless, burdensome residential lease (M.D.L. §284-1(ii)). For a state statute to be reasonable and necessary to serve a legitimate public purpose, it must be enacted to protect a basic societal interest, not merely the personal interest of retroactively selected private individuals. *Allied Structural Steel, supra; Home Bldg. & Loan Assoc. V. Blaisdell*, 290 U.S. 398, (1934) The contracts clause forbids an alteration in the relative position of two parties to an existing contract. *West Indian Trading Co., Ltd. v. Gov't of Virgin Islands*, 844 F.2d 1007 (3rd Cir. 1988); *South Terminal Corp. v. E.P.A.*, 504 F.2d 646, 680 (lst Cir. 1974). Here, there is a total legislative alteration of the rights of parties to a lease and a total abrogation of Plaintiffs contractual rights, vis a vis the former tenants; and legislatively granted years of rent free use by tenants of Plaintiff's property - and what are essentially lifetime estates (or longer) in Plaintiff's building.

In adopting the Loft Laws, the legislature purportedly "found" an "emergency" justified enactment. In reality, the so-called "emergency" which was the basis for the statute, was only that tenants knowingly violated their leases (and criminal statutes) by illegally residing in this building - and then wanted the state-granted "right" to do so in perpetuity, under much more favorable terms. If an "emergency" existed, it was totally self-created by the tenants. The Loft Laws rewarded these specific, identifiable and retroactively selected illegal occupants, by retroactively transferring Owner's property rights to them.

> A state cannot "adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them". *Home Bldg and Loan Assoc. v. Blaisdell, supra*, at 439 (1934).

Here, it is undisputed that the "rent stabilized" residential tenancies forcibly created, could last for generations yet unborn. The nullification of all essential contractual terms, and which effectively grants a perpetual leasehold interest in the premises, is far worse than in *Allied Structural Steel, supra*, especially where Owner is prevented from collecting any rent for an indefinite period (here, four or more years has resulted)

Contracts are not subject to unlimited modifications under the guise of "police power" and must serve a legitimate public purpose. *United States Trust Co. v. New Jersey*, 431 U.S. I at 22 (1977). As the Supreme Court held in *Allied Structural Steel Co. supra*,

> '... thus, the statute in question here nullifies express terms of the company's contractual obligations and imposes completely unexpected liability in potentially disabling amounts." 438 U.S. at 247.

Furthermore, there was no desperate nationwide depression as "justification" here:

> "Moreover, in at least one other important respect the Act does not resemble the mortgage moratorium legislation whose constitutionality was upheld in the *Blaisdell* case. This legislation, imposing a sudden, totally unanticipated, and substantial retroactive obligation upon the company to its employees was not enacted to deal with a situation remotely approaching the broad and desperate emergency economic conditions of the early

> 1930's conditions of which the Court in *Blaisdell* took judicial notice." 438 U.S. at 249.

Neither did the Loft Laws:

> "...effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships - irrevocably and retroactively. *Cf. United States Trust v. New Jersey*, 431 U.S.at 22..." *Allied Structural Steel*, 438 U.S. at 249

The Loft Laws retroactively and legislatively, imposed vast losses upon owner, and totally altered the relative position of the parties to an existing lease, and worked a severe, permanent and immediate change in the lease relationship, retroactively and irrevocably. Thus plaintiff retroactively had its legitimate contractual expectations destroyed [13]. Whether by gun or legislative pen, the result is the same [14]. *Nieves v. Hess Oil Virgin Islands Corp.* 819 F.2d 1237 (3rd Cir. 1987). In depriving owner of the long-term ability to obtain rent-paying and legal office tenants, and requiring Owner to suffer long-term estates from non-paying residential tenants (under

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[13] By imposing a totally new, long-term economic relationship upon Owner, the Loft Laws not only nullified the bargained-for lease expiration date, but also disregarded that, in calculating the rent for the services which Owner agreed to provide to tenants, Owner was never compensated for furnishing a totally rebuilt and reconstructed building plus a panoply of expensive additional "residential" services that are mandated by a myriad of laws and regulations governing 'residential 'tenancies in New York City. *e.g.*

[14] Furthermore, former tenants or current occupants are completely free to leave or skip out at any time during these years-long proceedings (leaving huge rent arrears uncollectible), and have no real obligations to Owner under the Loft Laws. It is interesting to note that although the Loft Laws contain a comprehensive section called "Owner Obligations" (M.D.L.§284), there is no section called "Tenant Obligations".

state license) the Loft Laws totally usurped Owner's fundamental rights.[16]

II-MULTIPLE DWELLING LAW, §§ 301 AND 302, WHICH RETROACTIVELY FORFEITED OWNER'S RENTS FOR MORE THAN FOUR YEARS, IS UN-CONSTITUTIONAL AS APPLIED HERE.

The "Loft Laws" are unconstitutional as applied here, because they retroactively deprived the property owner of THE most fundamental property right, i.e. the right to collect rent. Denying rent collection for an indefinite period, while Owner is forced to apply for unnecessary and self-destructive zoning and certificate of occupancy changes (with numerous hearings, administrative proceedings, and discretionary approvals), and forced reconstruction of its office/loft building into a subsidized apartment house, was a taking of its property rights; its rent was its only source of income.

> . . . But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property - without Paying for the privilege of doing so. Because the Due Process Clause of the

[16] The Loft Laws also deprived Owner of all rights to decide who its tenants would be, and upon what terms. There are occupants who have never had any lease or contractual relationship with Owner (and who have never paid any rent), but the Laws compel Owner to accept strangers and assignees as permanent residential tenants with long-term transferable estates, at their will, and reconstruct the building to their whim, without the payment of any rent and/or use and occupancy.

> Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment." *Hughes v. Washington*, 389 U.S. 290 at 298 (1967); Separate Opinion, Mr. Justice Stewart, concurring.

No business or property owner can survive when the state/city government decrees that "customers" can use or occupy or take owner's property or goods for free (until some future distant time) any more than a candy or shoe store could survive when the legislature decrees that customers can take candy or shoes with no need to pay, in order to remedy some alleged "public" problem.

The Loft Laws, as interpreted by the N.Y. courts herein have decreed that no rent or use and occupancy are collectible for a prolonged period. For real property investment, rent is the sole means of subsistence - its life's blood. The real estate, banking, construction and mortgage industries (and the basic American capitalist system) rest upon the bedrock concept that tenants must pay rent for using and occupying property; without rent, there is no economic value to any real estate investment; here this fundamental property right has been retroactively extinguished and confiscated - transferred as a windfall to specific, politically vocal tenants as a reward for their deliberate illegal acts by retroactive statutory *fiat*[16].

III. THE LOFT LAWS AS HERE APPLIED, VIOLATE THE SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS OF OWNER.

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[16] *First Eng. Evan. Luth. Ch., supra; Allied Structural, supra, United States v. 'General Motors, supra; cf. Flushing National Bank v. Mun. Assist. Corp., etc.*, 40 N.Y. 2d 731, 390 N.Y.S.2d 22 (1976).

The Loft Laws were not meant to protect the lives or safety of the public generally, but only to augment the property rights of a favored few, retroactively selected (tenants who refused to abide by leases and criminal laws, refused to pay rent or use and occupancy, and refused to vacate when leases ended); their self-created "emergency" was purportedly solved by a legislative transfer of long-term property rights to tenants, in premises which they had merely rented or occupied. A state does not have the constitutional power to seize control of a building and turn it over to former tenants, because tenants want long-term estates (and more) in the Owner's building, under the guise of "regulation". Without a serious constitutional guarantee of property rights, property has no value[17] and builders or investors or lenders won't invest in a state which capriciously and retroactively eviscerates property rights; thus the Loft Laws, if upheld here, would also be very counterproductive to all New York real estate, and the economy, development and employment in New York, and turn New York into a Cuban or Chinese type "democracy". *cf. Flushing Nat. Bank v. MAC, supra.*

Furthermore, the "Loft Board" is an unconstitutional "administrative body"; consisting of nine persons, all appointed by the mayor (with no other approval or consent) serving for such terms, at such salaries as the mayor may designate, and with no specific qualifications of any kind, but supposedly as "representatives" of specific interest groups. (MDL §282. However, eight out of nine members are, by their status, adverse to Owner's property interests[18]. The fundamental ownership rights

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[17] Here, not only are Plaintiff's property rights seized, but the national bank holding the first mortgage also had the value of its collateral annihilated by retroactive legislative fiat.

[18] The state did not have the constitutional power to make the mayor the Czar of private real estate, and the mayor did not have the constitutional power to further delegate such to a group of

of property cannot be divided among special interest groups, at the mayor's, legislature's or "Loft Board's" whim; "not bound by any official duty, but... free to withhold consent for selfish reasons or arbitrarily, and...subject...to their will or caprice" *Seattle Trust Co. v. Rogerge*, 278 U.S. at 122.

Owner's substantive due process rights were destroyed because 640 Broadway was stripped of all its lease and contract rights, the Owner was retroactively forced into bankruptcy by actual operation and effect of the Loft Laws[19]; forcing Owner to obtain a discretionary "special permit" and retroactively imposing an affirmative obligation of totally reconstructing its building under an "altered building application" is a compulsory zoning variance, unprecedented in the United States[20]. Zoning variances were created to resolve property owners' hardships, not prolong, create or perpetuate them; they are by nature permissive, not mandatory:

> "A variance permits an individual to use his property in a manner which an ordinance, literally enforced, would otherwise prohibit ...Intended to meet situations that can be

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private individuals, virtually all of whan have direct pecuniary or political interest adverse to the building owner, and financially affected by their own decisions. *See, Gibson v. Berryhill*, 411 U.S. 64 (1973), *Eubank v. Richmond*, 226 U.S.137 (1912); *Washington, ex rel v. Seattle Title Trust Co. Roberge*, 278 U.S.116 (1928)

[19] Furthermore, the Chairman of the Loft Board demonstrated total disdain for the U.S. Constitution by issuing "emergency" regulations of major substance, by himself (without the Loft Board) with no public hearings or opportunity for comment permitted, because the Loft Board Chairman believed: "observance of the requirement for notice and opportunity for comment in writing would be contrary to the public interest".

[20] *cf. Keystone Associates vs. Moerdler, 19* N.Y.2d 78 (Ct.Appeals 1966); *Fred French Investing OD. v. City of New York.* 39 N.Y.2d 587, 385 N.Y.S.2d 5 *cert. denied* 429 U.S. 990. (1976) *Seawall Associates, Ltd., v. City of New York*, 74 NY2d 92 (Ct of Appeals 1989)

> resolved in advance by ordinance, a variance relieves individual property owners from the harsh, unintended, or foreseeable commences of rigid enforcement..." (Cites omitted) *Barbian v. Panagis*, 694 F.2d 476 (7th Cir. 1982).

The retroactive Loft Laws "designation" made it statutorily impossible to collect any rent (for more that four years herein) - created a cloud on title and marketability, and totally annihilated normal investment expectations. *Urbanizadora Versailles, Inc. v. Rios*, 701 F.2d 993 (1st Cir. 1983). The holder of a valid building permit obtains a vested interest therein when he has performed substantial work in reliance upon that permit, *Lefrak Forest Hills Corp. v. Galvin*, 338 NYS2d 932, *aff'd* 32 NY2d 796 (1953); even when there is a subsequent change in zoning or building regulations prior to the completion of the building subject to permit. *Matter of Temkin v. Karaghezoff*, 34 NY2d 324, (1974).

> "It is well settled that one who, in reliance upon a permit validly issued by a municipality in good faith makes substantial improvements and incurs substantial expense in order to make his land suitable for a specific purpose or use, acquires a vested right to such use, even though, by reason of subsequent changes in the zoning ordinances, such use has become a prohibited or non-conforming use." (cites omitted). *Glenel Realty Corp. v. Worthington*, 164 NYS2d, 625, 638 (2d Dept. 1957)

A fortiori, a validly issued certificate of occupancy (only issued upon final completion of work under a building permit) creates vested property rights. Owner of 640 Broadway relied on existing zoning, and the valid 1966 certificate of occupancy , in the purchase and rehabilitation of a then virtually vacant building, which was a continuation of its conforming use as an

office/manufacturing building for more than 90 years. In *Lefrak, supra*, the New York Court of Appeals recognized vested rights in continuation of a particular zoning classification, where there is reliance upon the zoning, and substantial construction work has been done; it held that the installation of a foundation was enough. Here, Owner had a completed, 100 year old office/ manufacturing building, which the zoning always permitted, and still does. Owner had a fundamental right to continue the office/manufacturing use of its building, which is the conforming use, and was the legal use of the building since built, and the city/state cannot constitutionally require Owner to apply for a discretionary zoning regulation; - and in the meantime, forfeit all rent belonging to Owner - and given as a windfall to tenants holding over, and illegally using the property in violation of law and their written leases.

IV - AS APPLIED HERE, THE LOFT LAW IMPOSES A PUNITIVE RETROACTIVE CONFISCATION OF PROPERTY, THEREFORE IT CONSTITUTES AN UNCONSTITUTIONAL BILL OF ATTAINDER OR *EX POST FACTO* LAW

The undisputed facts show that the Loft Laws constitute an unconstitutional Bill of Attainder, or bill of "pains and penalties" included therein, or *ex post facto* law; *i.e.*, legislative punishment for retroactively decreed crimes, *Cummings v. Missouri*, 71 U.S. [4 Wall) 277, 18 L.Ed. 356, (1867). The specific buildings which were retroactively subjected to the Loft Laws, by defendants' admission, were known in advance of enactment, and were retroactively pre-selected from specific membership lists of tenants organizations; the *sine qua non* of the Loft Laws is that the tenant who illegally lived there (or transferee) is rewarded with a long-term estate in the premises at the expense of Owner - and the Owner is deprived of all rent collections for many years. The owners of such buildings were retroactively singled out

for disparate treatment. *United States v. Lovett*, 328 U.S. 303 (1946); *U.S. v. Brown*, 28 U.S. 437 (1965). That the Loft Laws constitute a form of legislative punishment also can not be denied. (MDL §304; §302-1-b; §284-1-ii; §282) Basic property rights have been seized; uncompensated compulsory capital investment of up to Two Million Dollars, and a forced zoning change and repudiation of the certificate of occupancy is not "regulation". Rather, it constitutes punitive confiscation of owner's property, including rent collection, retroactively and legislatively imposed; such non-judicial punishment upon an identifiable group is a violation of the Bill of Attainder and *ex post facto* Clauses.[21] *Cummings V. Missouri, supra.* Furthermore, then-existing punishment for violation of the M.D.L. was fines of $500 or $1,000; the state/city ignored existing law (MDL §304; and passed the Loft Laws instead, inflicting virtual confiscation of the property for the unnamed "crime" of the tenants who deliberately, willfully and illegally lived in a loft owned by Plaintiff. The bill of attainder and *ex post facto* clauses prohibit enactment of laws that either impose punishments for acts not punishable at the time they were committed, or increase punishment over that previously prescribed. *Cummings v. Missouri, supra; Fletcher v. Peck*, 10 U.S. (6 Cranch) 128 (1810).[22]

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[21] Even though the Loft Law does not contain any definition of the purported "crime", it cannot be denied that Owner has been punished for its pre-enactment "status". The Loft Laws do not depend on whether or not the Owner "knew or constructively knew" about the illegal residential use; all are snared in the same trap if the narrowly defined conditions existed for that preenactment time period (April 1980-December 1981); and the building is permanently ensnared.

[22] *Louis Vuitton, S.A. v. Spencer Handbags* 765 F2d 966 (2nd Cir 1985); *Weaver v. Graham*, 450 U.S. 24 (1981). *Harisades v. Shaughnessy* 342 U.S. 580 (1952); *Deveau v. Braisted* 363 U.S 144 (1960) *cf. People v. Broadway-Sheridan Arms*, 90 N.Y.S.2d 445 (1st Dept. 1949); aff'd. 300 N.Y.S. 59 (1949).

The Loft Laws, if upheld here, have already confiscated four years or more of owners rents, and forced its bankruptcy, but further, now also: (1) compel Owner to undertake complete reconstruction; (2) owner is retroactively stripped of rights to own a lawful commercial building, and (3) substantial property rights are extinguished or rendered valueless, including the Owner's right to choose tenants, or the terms of the tenancy; and/or to negotiate any aspect of any lease at any time in the foreseeable future. This is either a classic Bill of Attainder, or a "bill of pains and penalties," which the Supreme Court has long held as included in the prohibition. *Cummings v. Missouri, supra; Fletcher v. Peck, supra.*

While the Loft Law "findings" contained blanket "indictments" (§280 M.D.L.); the legislative indictment and punishment of 640 Broadway - by the retroactive seizure of control and use of its building - was constitutionally infirm because it constituted a Bill of Attainder or *ex post facto* law.[23]

V - AS APPLIED HERE, THE LOFT LAWS DEPRIVED OWNER OF EQUAL PROTECTION OF THE LAW

In *Hooper V. Bernalillo County Assessor*, 472 U.S. 612 (1985), the Court held a statute unconstitutional because the retroactive distinction between different classes of resident veterans, by the date they moved to New Mexico, was not rationally related to the asserted

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[23] Even assuming, *arguendo*, that the Owner knew or should have known that the tenants used the premises illegally, there was no justification for retroactive legislative expropriation; There is clearly an presumption of guilt, and a retroactive legislative punishment. *cf. United States v. Brown, supra.* If the Owner committed any crime, the state/city could have prosecuted Owner under existing law, instead; Owner was punished by legislative seizure; furthermore, increasing the penalty for previously committed "wrongs" is also improper law. *Cummings v. Missouri, supra; Fletcher v. Peck,, supra.*

BEST AVAILABLE

there was no rational basis, in June 1982, for treating owners of buildings with illegal residential tenants, during the retroactive and capriciously selected period (April 1, 1980 - December 1, 1981) totally differently from other owners that had residential tenancies either: (a) prior to those dates, or (b), after those retroactively selected dates; both classes of which were exempted[24]; This retroactive classification did not rationally further a legitimate government purpose. The statutory scheme invidiously discriminated in another major way, by excluding buildings owned by a municipality (MDL §281-1 (ii)); there was no rational reason to exclude municipally-owned buildings and there are numerous other discriminatory provisions.

VI - AS APPLIED HERE, DESIGNATION UNDER THE LOFT LAWS AUTHORIZED A PERMANENT PHYSICAL INVASION OF OWNER'S PROPERTY AND CONSTITUTED A TAKING WITHOUT JUST COMPENSATION

This statutory scheme goes "too far" and should be recognized as a taking. *Nollan v. Calif. Coastal Commission*, 483 U.S. 825 (1987). *First English Evan. Luth. Ch. v. Los Angeles Cty*, 482 U.S. 31 4 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987). The decisions of the courts below conflict with express constitutional provisions, and controlling authority of the Supreme Court; *Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419,*

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[24] creating a specially burdened class of building owners and specially privileged class of occupants, distinguished only by the dates of the tenants' willful illegal occupancy, prior to enactment. *City of Cleburn v. Cleburn Living Center*, 473 U.S. 432, (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Plyer v. Doe*, 457 U.S. 202 (1982); *Zobel v. Williams*, 457 U.S. 55 (1982); *United states Department of Agriculture v Moreno*, 413 U.S., 528 (1973); *English v. Town of Huntingtcn*, 448 F.2d 319 2nd Cir. 1971)

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(1982); cf Seawall Associates v. City of N.Y., 74 N.Y.2d 92 (Ct. of App. 1989). Under its valid certificate of occupancy, this building could only be used for manufacturing or office purposes; the net effect of the Loft Laws "designation" was to deprive Owner of its basic property rights, including, but not limited to, precluding Owner from using it in accordance with its existing certificate of occupancy and zoning. Furthermore, the Loft Laws extinguished Owner's rights to collect rent, or use and occupancy, for an indefinite period; here, at least 4 years, and forced Plaintiff into bankruptcy. The Loft Laws also expressly deprived Owner of the right to terminate tenants unpaid use by removing them (MDL 286-1); Owner had a Hobson's choice: (1) if Owner wanted to ever collect rent (at some distant future time), it had to convert the building to a multiple dwelling at huge expense, enter a new business with no means to pay for or finance the reconstruction; or (2) it could not collect any rent, nor ever recover possession of its property; and was subject to criminal and civil penalties anyway. (MDL §304)

Thus, because tenants knowingly and illegally slept in the building in 1980-81, owner is now legislatively stripped of the right to use the building for the only legal use thereof since it was built[25] , and to collect rent from the people using and occupying the building - because of the tenants own illegal acts. The Loft Laws also deprive Owner of the fundamental right to decide how it will invest funds. It was not disputed that to reconstruct the building to comply with applicable multiple dwelling laws, Owner would have a forced expenditure of up to Two

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[25] The Loft Laws do not apply to any specific zoning map or geography, but are applied on a specific, building-by-building basis retroactively selected to include specific persons and buildings, during that sole arbitrary period of 1980-81; Owner's knowledge or consent is irrelevant.

Million ($2,000,000) Dollars to: (a) obtain a discretionary zoning variance, a special permit," an altered building application and a new certificate of occupancy, none of which it wants or needs; (b) make major structural alterations and improvements, unnecessary for existing legal uses; and (c) permanently convert a presently legal office/manufacturing building into a residential multiple dwelling, to satisfy its former tenants (now squatters who paid no rent for use and occupancy for more than four years) and to suffer the long-term leasehold estates granted them in Owner's property, by this legislation. Owner never authorized perpetual, at will, lease renewals for tenants, with no obligations; the State did that. Owner never authorized occupants to use the premises rent-free; the State did that; thus the state/city confiscated all but the bare legal title of Owner's fee estate. The Constitution prevents a state/city from retroactively imposing permanent legal relationships, to which the owner never agreed or consented, which constitutes a lifetime (or longer) enforceable estate in owner's property, and annihilates its marketability. *Loretto supra; Sederquist v. City of Tiburon*, 265 F.2d 756 (9th Cir. 1984); *Silverman v. Barry*, 727 F.2d 1121 (D.C.Cir. 1984)

Where state action results in the physical occupation of private property, there is a *per se* taking; when the character of the government action

> "is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only a minimal impact on the owner". *Loretto*, 458 U.S. at 434-5.

In *Loretto*, even though the amount of space occupied by cable, wires and boxes was minimal, this was a *per se* taking for which compensation must be paid. Here, the

invasion is vastly more pervasive, virtually total (eight stories out of a nine-story building are totally taken - no rent is collectible for many years -) the income from the balance of the building is sequestered to subsidize the non-paying residential tenants, and complete operational control of the building, and its future use and rental value are usurped. The Loft Laws demand that owners of certain (approximately 800) arbitrarily and retroactively selected commercial buildings, acquiesce to permanent occupation of their property by illegal residential tenants and squatters. Incredibly, the *sine qua non* of this legislation is the tenants' deliberate pre-enactment illegal use. Owner here executed short leases (which expired long ago); the challenged statutes retroactively require Owner to permit the long-term physical occupation of its building by third parties, and an affirmative obligation to reconstruct the building to tenants' whims at Owner's expense without compensation - while being unable to collect rent while the tenants squatted in Owner's property, subleased and "sold" their "rights", and demanded vastly different and increased "services" than the leases agreed to provide - while at the same time, and extinguishing virtually every provision of the lease that benefited owner. *Loretto, supra; Kaiser Aetna v. U.S.*, 444 U.S. 164, (1979); *Herrington v. Sonoma County*, 834 F.2d 1488 (9th Cir. 1987).

Here, Owner's rights to decide who occupies its property and upon what terms are asphyxiated. The owners rights to collect any rent for many years is retroactively usurped and taken - and given as a windfall to former tenants.

"The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto*, 458 U.S. at 426.

Loft Laws "designation" extinguished owner's rights to possess, rent or use its own building or exclude

squatters or occupants from long term unpaid possession or use. Even a temporary taking creates the constitutional obligation to pay just compensation. *First Eng. Evan Lutheran Church v. Los Angeles, supra; United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). *Sawyer v. U.S. Steel et al*, 197 F.2d 582, aff'd 343 U.S. 579 (1952).

Here, the Loft Laws constituted a *per se* taking, in violation of the 5th and 14th Amendments.

VII - THERE WERE NUMEROUS ISSUES OF FACT PRECLUDING SUMMARY JUDGMENT

Plaintiff was denied due process by the court's granting of summary judgment in the face of numerous material issues of fact, including (1) whether Plaintiff complied with (or even had to comply with) the statutory requirements of the Loft Law within various legislative time periods; (2) the issue of Plaintiff's involuntary withdrawal, in 1985, of its "special permit" application from the City Planning Commission, which was, in fact, not voluntary, but caused solely by changes in the law in 1985 that withdrew the City Planning Commission's authority to grant such permit; and (3) whether Plaintiff took all reasonable and necessary steps to obtain a Certificate of Occupancy as then required, and (4) numerous other critical factual matters. The New York Courts relied upon an attorney's affidavit, filled with speculation and surmise, as to such facts, and erroneously denied Plaintiff its day in court thereupon. Furthermore, the New York Courts erroneously denied Plaintiff's motion to amend its complaint herein, and improperly assumed that all the factual allegations of Defendants' motion papers were true, even though made by an attorney, and even though sharply disputed; again, this totally deprived Plaintiff of its day in Court.

In granting summary judgment, the IAS Court also erroneously dismissed the third cause of action based

Contrary to the Court's statement that there was "no evidence" that the tenants had breached any provisions of their leases, there was voluminous evidence, which must be deemed true upon motion for summary judgment.[28] Furthermore, discovery would have uncovered the true physical layouts and occupancies of the units, all of the details of the illegal sublettings and profiteering by tenants, and the facts to establish constructive trusts over the funds tenants misappropriated from Plaintiff, specifically because many of them had been subdivided without Owner's permission.

CONCLUSION

This case represents fundamental questions of nationwide importance regarding basic property rights, and a writ of certiorari should be granted; if the property rights provisions of the Constitution and the Bill of Rights are eviscerated or rendered meaningless, as here, by retroactive state/city legislation, then the investment value of all commercial real estate in the nation (which is totally dependent upon rent income) is substantially diminished.

The Petition for a writ of certiorari should be granted.

Dated: New York, N.Y.
December 5, 1995

Respectfully submitted,

MARTIN R. FINE
Respectfully submitted,
Attorney for Petitioner
644 Broadway
New York, N. Y. 10012
(212) 477-0715

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[28] *cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)(courts forbidden to make credibility determinations on summary judgment); *Hardin v. Pitney-Bowes, Inc.*, 451 U.S.1008 (1981) (Rehnquist, J., dissenting from denial of certiorari)("summary judgment simply may not be granted when such matters as the defendant's motive and intent are questioned.

APPENDIX A — ORDER OF THE NEW YORK COURT OF APPEALS DATED SEPTEMBER 7, 1995

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh day of September 1995

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

1-10 Mo. No. 773

640 Broadway Renaissance Co.,

Appellant,

v.

John Eisner, et al.,

Respondents,

and 15 Other Cases Consolidated
for Purposes of a Joint Appeal.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed

from does not finally determine the action within the meaning of the Constitution.

s/ Stuart M. Cohen
Stuart M. Cohen
Deputy Clerk of the Court

APPENDIX B — DECISION AND ORDER OF THE SUPREME COURT APPELLATE DIVISION FIRST DEPARTMENT ENTERED FEBRUARY 7, 1995

Murphy, P.J., Sullivan, Rosenberger, Ross, JJ.,

53934-49 640

Broadway Renaissance Co., B.H. Wiener

Plaintiff-Appellant,

-against-

John Eisner, et al., D. Ratner

Defendant-Respondents,

-and-

15 Other Cases Consolidated for
Purposes of a Joint Appeal.

Sixteen orders, Supreme Court, New York County (Joan Lobis, J.) entered on or about November 15, 1993, which granted defendants' motions for summary judgment dismissing the complaint, directed the Clerk to enter judgment accordingly, and denied plaintiff's cross-motion for discovery sanctions, leave to amend pleadings and related relief without prejudice to plaintiff's commencing proceedings in Civil Court for prospective rent and on the basis of any claim of illegal subletting, and to seek discovery in those actions concerning alleged subletting, unanimously affirmed, with one bill of costs.

Appendix B

To collect rent on the subject loft units, plaintiff owner was required to be in compliance with the Loft Law (Multiple Dwelling Law §§285[1], 302[1][b]). The plaintiff withdrew its application for a necessary special permit that would have brought the subject building into compliance with the Loft Law, and then never sought to renew the application, despite a Loft Board order. It therefore cannot claim the benefits of 1992 amendments to the statute (*see, Goho Equities v. Weiss*, 149 Misc 2d 628, 630), and cannot seek the benefits of the 1992 amendments to the statute retroactively (*Grossman v. MKF Realty Corp.*, 203 AD2d 129). As to the prospective claims for rent and illegal subletting and attendant discovery needs, it was not an abuse of discretion for the IAS court to conclude that Civil Court was the appropriate venue (*see, Sims v. Manley*, 120 AD2d 405, *affd*, 69 NY2d 912).

We have considered the plaintiff's remaining arguments, and find them to be without merit.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 7, 1995

s/ Catherine O'Hagan Wolfe
CLERK

APPENDIX C — DECISION OF THE SUPREME COURT OF NEW YORK COUNTY OF NEW YORK DATED JULY 12, 1993

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 20

Index Nos. 23830/92,
23831/92, 23832/92,
23833/92, 23834/92,
23835/92, 23836/92,
23837/92, 23839/92,
23840/92, 23941/92,
23842/92, 23843/92,
23844/92, 23845/92,
and 29602/92.

540 BROADWAY RENAISSANCE CO.,

Plaintiff,

-against-

JOHN EISNER, ET AL.,

Defendants.

Decision

JOAN B. LOBIS, J.S.C.

The plaintiff landlord has commenced sixteen identical actions against various tenants of the building for non-payment of rent, for damages for subjecting the premises to the provisions of the loft law and for attorneys' fees. The tenants have each

Appendix C

brought a motion for summary judgment dismissing the complaint. The landlord has brought a cross-motion in each of the actions for an order: (1) striking the answers of each defendant on the ground that they have failed to comply with discovery, (2) awarding sanctions for the alleged willful conduct of defendants, (3) amending the complaint to add a cause of action for constructive trust, (4) amending the reply, and (5) directing the payment of use and occupancy prospectively. All of the motions are hereby consolidated for disposition. For the reasons stated below, defendants' motion for summary judgment dismissing the complaints are granted and plaintiff's cross-motion is denied except that any claim for prospective rent may be commenced by the plaintiff in Civil Court.

The building in which the defendants are tenants is a nine story building located at the corner of Bleecker and Broadway. In April 1988, the New York City Loft Board determined that the building is an interim multiple dwelling subject to Article 7-C of the Multiple Dwelling Law (the "Loft Law"). The owner of the building was ordered to register the premises as an interim multiple dwelling with the Loft Board. The order also stated that continued coverage of the premises was contingent upon the granting of a special permit by the City Planning Commission. The decision of the Board has never been appealed and the time in which to make such an appeal has long since expired. As of August 1992, plaintiff had done nothing to comply with its legalization obligations under the Loft Law.

The Loft Law, as originally enacted, required subject owners to bring their buildings up to code as Class A Multiple Dwellings within a specified timetable set out in Multiple Dwelling Law ("MDL") section 284. The owner was permitted to collect rent during the legalization process on the condition that the owner

register the building with the Loft Board and comply with the legalization timetable set out in MDL section 284. If the owner did not register the building or comply with the legalization schedule set out in the Loft Law, the owner was not entitled to collect rent. *See County Dollar Corporation v. Douglas*, 160 A.D.2d 537 (1st Dep't 1990).

In 1992, there was a major legislative overhaul of the Loft Law. The Loft Law now provides that landlords who have failed to comply with the previous requirement to obtain a residential certificate of occupancy in accordance with the requirements of section 284.1 (i) shall hereafter be deemed in compliance with the Loft Law provided that the owner complies with the new timetable laid out in the statute for upgrading the building and obtaining a certificate of occupancy. The statute now provides that "an owner who has not complied with the requirements of paragraph (i) of this subdivision by the effective date of the chapter of the laws on nineteen hundred ninety-two which added this paragraph shall hereafter be deemed in compliance with this subdivision provided that such owner files an alteration application by October first, nineteen hundred ninety-two. . . ." and complies with the other subsequent requirements contained therein. Pursuant to the amendments to the statute, an owner can now collect rent even though the building is not yet in compliance with the prior requirements of the statute as the owner is "deemed in compliance hereafter" as long as the owner complies with the subsequent steps set out in the statute.

Since the time that the statute was amended, the owner of the building has filed an alteration application with the Loft Board. It therefore claims that it is entitled to rent on a prospective basis. Any such claim for ongoing rent should be commenced in the Civil Court. There is no reason that the Supreme Court should

retain jurisdiction over the owner's claim for rent on a prospective basis.

The landlord's claim for rent on a retroactive basis is denied. It is undisputed that the owner of the building was not in compliance with the requirements of the Loft Law prior to the recent amendments as it had not even registered the building. It therefore had no right to collect rent: *See Dollar, supra.* Although plaintiff argues that the amendments to the Loft Law should be retroactively applied, this court has previously held that the amendments to the Loft Law do not allow the owner of the building to collect rent on a retroactive basis. *Grossman v. MKF Realty Corp.*, N.Y.L.J. Oct. 20, 1992, p. 21, col. 6 (Sup. Ct. N.Y. Co.). This Court held in *Grossman* that:

> Although the owner is entitled to rent on an ongoing basis as long as it complies with the new requirements set out in section 284.1 (ii), there is no basis for the landlord's request for retroactive rent. The amended statute provides that the owner "shall hereafter be deemed in compliance with this subdivision. . . ." Thus, prior to the date of the amendment, the owner was not in compliance with the requirements of the law. As this Court noted in it prior decision, the First Department has held that an owner of an interim multiple dwelling is not entitled to collect rent in the absence of compliance by the owner with the loft law. *See County Dollar Corporation v. Douglas, 160 A.D.2d 537* (1st Dep't 1990).

Appendix C

Plaintiff's argument that it was in compliance with the provisions of the Loft Law prior to the amendments is rejected. According to plaintiff, the statutory timetables originally set forth in the Loft Law did not take effect for the building until plaintiff obtained a special permit. Since plaintiff never obtained a special permit, it claims that it has always been in compliance with the Loft Law. What plaintiff fails to acknowledge in its argument is that the only reason plaintiff never obtained a special permit for the building is that plaintiff withdrew its application for a special permit. For an owner to obtain a special permit, it must apply to the City Planning Commission. Although plaintiff made an application, it withdrew it in 1985 while the hearings were proceeding before the Loft Board. The Loft Law specifically provides that a landlord "shall take all reasonable and necessary action to obtain a certificate of occupancy as a Class A multiple dwelling" within three years of the effective date of the Loft Law. Here, plaintiff violated the foregoing provision of the Loft Law by failing to pursue and actually withdrawing its application for a special permit. Thus, plaintiff was clearly not in compliance with the provisions of the Loft law prior to the amendments as a result of its own inaction. Thus, there is no basis for its claim for retroactive rent.

Plaintiff has also asserted a cause of action against the tenants for subjecting it to the provisions of the Loft Law. Plaintiff's claim is based on the indemnification clause of the leases. These clauses are standard indemnification clauses which provide that the tenant will indemnify the owner for damages caused by any breach of the tenant of the provisions of the leases or damages claimed by persons as a result of work performed by or on behalf of the tenant. There is no basis for this cause of action as a matter of law and it is dismissed. Initially, there is no evidence that the tenant has breached any provision of the lease.

Appendix C

Secondly, there is no evidence that the landlord has suffered damages in the traditional sense as a result of the work performed by the tenants on their individual lofts. The provision of the lease with respect to indemnification is meant to come into play when a third party is injured as a result of work being performed by or for the tenant on the tenant's premises. Similar in purpose to the provisions requiring insurance coverage, this clause is a risk allocation requiring tenants to indemnify the landlord for any claims against the landlord for damages arising from acts performed by or on behalf of the tenants. It was not intended to apply to a situation, such as the present one, where the Legislature has enacted a law providing that certain buildings are subject to the Loft Law as a matter of public policy. It is not any action or inaction on the part of tenants which has caused landlord damages — it is the enactment of the Loft Law by the New York State Legislature. To hold otherwise would be contrary to the language of the leases and would be violative of public policy.

Similarly, the plaintiff's motion to amend its complaint to add a cause of action for constructive trust is denied on the ground that plaintiff cannot state a cause of action for a constructive trust. If the landlord believes that any of the tenants have illegally subletted their apartments, it should commence an action in Civil Court with respect to such illegal sublets. Otherwise, there is no legal basis for the plaintiff's claim that it is entitled to recover rent which the legislature and the courts have expressly held that it is not entitled to.

Finally, there is no basis for plaintiff's argument that summary judgment is inappropriate on the ground that it requires discovery. Plaintiff has not shown any discovery it requires which would merit a denial of defendants' motions for summary judgment. To the extent that plaintiff requires discovery about

alleged illegal subletting, it should make application or move to obtain such discovery in Civil Court in connection with any claim it may have against a particular tenant based on an illegal sublet.

Settle order.

July 12, 1993

s/ JBL
JOAN B. LOBIS, JSC

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK DATED NOVEMBER 10, 1993

At IAS Part 20 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse located at 60 Centre Street, New York, New York, on the 10 day of November 1993

Index No. 23830/92

PRESENT:

HON. JOAN B. LOBIS
Justice

640 BROADWAY RENAISSANCE CO.,

Plaintiff,

-against-

JOHN EISNER, MAUREEN EISNER, "JOHN" OR "JANE" TRINGALE, "JOHN DOE" AND "JANE DOE",

Defendants.

ORDER

Defendants, having duly moved this Court for an Order, pursuant to CPLR 3212, for summary judgment, and for such other and further relief as is just and proper, and plaintiff 640

Appendix D

Broadway Renaissance Co. having duly cross-moved for an Order: (a) striking defendant's Answer or alternatively compelling defendants to appear for depositions and vacating the automatic stay of discovery pursuant to CPLR 3214 (b); (b) requiring defendants to pay sanctions for their willful conduct; (c) amending the complaint to add a cause of action for constructive trust; (d) amending plaintiff's Reply to add and affirmative defense and a denial to defendant's fourth counterclaim; (e) directing the payment of use and occupancy prospectively; and (f) for such other and further relief as the Court deems just and proper, and the motion and cross-motion having regularly come on to be heard on June 25, 1993.

NOW, upon reading and filing the Notice of Motion dated January 6, 1993, the Affidavit of Joel Hinman in support of the motion, sworn to on January 6, 1993, the Reply Affirmation of David Ratner dated March 26, 1993, in further support of the motion, and the exhibits annexed thereto, and upon reading and filing the Notice of Cross-Motion, dated February 17, 1993, and the Affirmation of Bruce H. Wiener dated February 17, 1993, and the Affidavit of George Peters, sworn to on February 17, 1993, in support of the cross-motion, and the Reply Affirmation of Bruce H. Wiener dated April 29, 1993, and the Reply Affidavit of George Peters, sworn to on April 29, 1993, and the exhibits annexed thereto, and the Complaint and Answer to the Complaint and Counterclaims heretofore served herein, all with proofs of due service, and Bruce H. Wiener having duly appeared in support of the cross-motion and in opposition to the motion, and David Ratner having appeared in support of the motion and in opposition to the cross-motion, and after due deliberation having been had and this Court having rendered its decision, in writing, dated July 12, 1993, it is

Appendix D

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted; and it is further

ORDERED that plaintiff's cross-motion is denied without prejudice to plaintiff commencing proceedings in Civil Court for any claim for prospective rents, and without prejudice to plaintiff commencing proceedings in Civil Court in connection with any claim of illegal subletting and moving therein to obtain discovery in connection with any such claim of illegal subletting; and it is further

ORDERED that the plaintiff's complaint is dismissed and the clerk is directed to enter judgment in favor of the defendants.

ENTER:

s/ JBL
J.S.C.

APPENDIX E — ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK DATED NOVEMBER 10, 1993

At IAS Part 20 of The Supreme Court of The State of New YOrk, held in and for the County of New York, at the Courthouse located at 60 Centre Street, New York, New York, on the 10 day of November 1993

Index Nos: 23821/92;
23832/92; 23833/92;
23834/92; 23835/92;
23836/92; 23837/92;
23839/92; 23840/92;
23841/92; 23842/92;
23843/92; 23844/92;
23845/92; and 29602/92

PRESENT:

HON. JOAN B. LOBIS
Justice

640 Broadway Renaissance Co.,

Plaintiff

-against-

ORDER

All orders indentical to index number 23830/92

APPENDIX F — COMPLAINT IN THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK DATED OCTOBER 9, 1992

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 23830/92

640 BROADWAY RENAISSANCE CO.,

Plaintiff,

-against-

JOHN EISNER, MAUREEN EISNER, "JOHN" OR "JANE" TRINGALE, "JOHN DOE" AND "JANE DOE",

Defendants.

COMPLAINT

Plaintiff, 640 BROADWAY RENAISSANCE CO., by its attorneys Fischbein • Badillo • Wagner • Itzler, as and for its Complaint against defendants JOHN EISNER, MAUREEN EISNER, "JOHN" OR "JANE" TRINGALE, "JOHN DOE" AND "JANE DOE" alleges:

1. Plaintiff 640 Broadway Renaissance Co. ("plaintiff" or "Renaissance Co.") is a partnership organized and existing under the laws of the State of New York with offices located at c/o Horatio Management Corp., 644 Broadway, New York, New York.

Appendix F

THE PARTIES

2. Upon information and belief, defendant John Eisner ("Eisner") was and is the tenant of a certain loft known as Unit No. 2E, in the building known as 640 Broadway, New York, New York (the "premises").

3. Upon information and belief, defendants Maureen Eisner, "John" or "Jane" Tringale, now claimed to be "Gasper" Tringale, "John Doe" and "Jane Doe" are possible undertenants in occupancy of the premises whose true identities are not known to Renaissance Co.

BACKGROUND

4. Upon information and belief, Eisner was and is the tenant of the premises who entered into possession thereof under a written rental agreement, dated December 31, 1980, by and between Renaissance Co. and Eisner (the "Agreement"), wherein Eisner promised to pay to Renaissance Co. certain rent and additional rent specified in the Agreement, in advance, on a monthly basis on the first day of each month for use of the premises.

5. That although the premises was initially rented for commercial purposes, upon information and belief, the premises has been used, and is continuing to be used for dwelling purposes.

6. That subsequent to the execution of the Agreement, Eisner, without the permission and/or consent of Renaissance Co., permitted defendants Maureen Eisner, "John" or "Jane" Tringale, now claimed to be "Gasper" Tringale, "John Doe" and/or "Jane Doe" to occupy the premises.

7. That the premises are currently subject to Article 7-C of the Multiple Dwelling Law, commonly known as the Loft Law, as amended, and Renaissance Co. has duly registered the premises with the New York City Loft Board and is in compliance with the statute.

AS AND FOR A FIRST CAUSE OF ACTION

8. That plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "7" as if more fully set forth below.

9. That defendants, notwithstanding the unambiguous terms of the Agreement, have failed and refused to pay rent or additional rent to plaintiff, or use and occupancy for the premises.

10. That through and including August 31, 1992, defendants have failed to pay rent and additional rent totalling at least Fifty-Nine Thousand Seven Hundred Ninety-Three and 13/100 ($59,793.13) Dollars.

11. That by reason of defendants' breach of the Agreement, and their use and occupancy of the premises, plaintiff has sustained damages in an amount to be determined by the court, but not less than Fifty-Nine Thousand Seven Hundred Ninety-Three and 13/100 ($59,793.13) Dollars.

AS AND FOR A SECOND CAUSE OF ACTION

12. That plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "11" as if more fully set forth below.

13. That by reason of the foregoing, plaintiff was required to

engage, and has engaged, counsel to enforce its rights under the Agreement.

14. That in accordance with paragraphs "19" and "57" of the Agreement, defendants are liable for payment of attorneys' fees and expenses incurred by plaintiff, where defendants violate any covenant contained in the Agreement, including but not limited to, defendants' obligation to pay rent and additional rent.

15. That by reason of defendants' breach of the Agreement, plaintiff has incurred attorneys' fees and expenses, and will continue to incur attorneys fees and expenses in an amount not less than Twenty-Five Thousand ($25,000.00) Dollars.

AS AND FOR A THIRD CAUSE OF ACTION

16. That plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "15" as if more fully set forth below.

17. That in accordance with paragraphs "8" and "40" of the Agreement, defendants are required to indemnify plaintiff against and from any and all liabilities, obligations, damages, penalties, claims, costs and expenses, including but not limited to attorneys' fees, as a result of any breach by defendants of the provisions of the Agreement.

18. That defendants have breached the Agreement by, among other things, illegally converting the premises for dwelling purposes, causing violations to be placed on the premises, and subjecting the premises to the provisions of the Loft Law.

19. That by virtue of defendants' breach of the Agreement,

plaintiff has incurred substantial costs and expenses, and will continue to incur such costs and expenses, in an amount to be determined by this court, but not less than Fifty Thousand ($50,000.00) Dollars.

WHEREFORE, plaintiff respectfully requests that the court enter judgment as follows: (a) on the first cause of action, damages in the amount of Fifty-Nine Thousand Seven Hundred Ninety-Three and 13/100 ($59,793.13) Dollars; (b) on the second cause of action, damages in the amount of not less than Twenty-Five Thousand ($25,000.00) Dollars; (c) on the third cause of action, damages in the amount of not less than Fifty Thousand ($50,000.00) Dollars; (d) interest, from August 26, 1986, through the date judgment is entered; and (e) for such other and further relief as this Court deems just and proper, together with the costs and disbursements of this action.

Dated: New York, New York
October 9, 1992

Yours etc.,

FISCHBEIN • BADILLO • WAGNER • ITZLER
Attorneys for Plaintiff
909 Third Avenue
New York, New York 10022
(212) 826-2000

TO: HARTMAN, ULE, ROSE & RATNER
Attorneys for Defendant
Gasper Tringale named as "John" Tringale
305 Broadway
New York, New York 10007
(212) 437-9110

APPENDIX G — MULTIPLE DWELLING LAWS

Section

280. Legislative findings.
281. Definition of "interim multiple dwelling".
282. Establishment of special loft unit.
283. Occupancy permitted.
284. Owner obligations.
285. Owner protection.
286. Tenant protection.
287. Alternative compliance.

§ 280. Legislative findings.

The legislature hereby finds an declares that a serious public emergency exists in the housing of a considerable number of persons in cities having a population of over one million which emergency has been created by the increasing number of conversions of commercial and manufacturing loft buildings to residential use without compliance with applicable building codes and laws and without compliance with local laws regarding minimum housing maintenance standards; that many such buildings do not conform to minimum standards for health, safety and fire protection; that housing maintenance services essential to maintain health, safety and fire protection are not being provided in many such buildings; that as a consequence of the acute shortage of housing as found and declared in the emergency tenant protection act of nineteen seventy-four[1] the tenants in such buildings would suffer great hardship if forced to relocate; that as a result of the uncertain status of the tenancy in question the courts have been increasingly burdened with disputes between landlords and tenants regarding their respective rights and obligations under

the existing circumstances; that some courts have declared such buildings "de facto" multiple dwellings; that illegal and unregulated residential conversions undermine the integrity of the local zoning resolution and threaten loss of jobs and industry; that the intervention of the state and local governments is necessary to effectuate legalization, consistent with the local zoning resolution, of the present illegal living arrangements in such "de facto" multiple dwellings, and to establish a system whereby residential rentals can be reasonably adjusted so that residential tenants can assist in paying the cost of such legalization without being forced to relocate; that in order to prevent uncertainty, hardship, and dislocation, the provisions of this article are necessary and designed to protect the public health, safety and general welfare.

§ 281. Definition of "interim multiple dwelling"

1. Except as provided in subdivision two of this section, the term "interim multiple dwelling" means any building or structure or portion thereof located in a city of more than one million persons which (i) at any time was occupied for manufacturing, commercial, or warehouse purposes; and (ii) lacks a certificate of compliance or occupancy pursuant to section three hundred one of this chapter; and (iii) on December first, nineteen hundred eighty-one was occupied for residential purposes since April first, nineteen hundred eighty as the residence or home of any three or more families living independently of one another.

2. Notwithstanding the definition set forth in subdivision one of this section, the term "interim multiple

dwelling" includes only (i) buildings, structures or portions thereof located in a geographical area in which the local zoning resolution permits residential use as of right, or by minor modification or administrative certification of a local planning agency, (ii) buildings or structures which are not owned by a municipality, (iii) buildings, structures or portions thereof within an area designated by the local zoning resolution as a study area for possible rezoning to permit residential use, or (iv) buildings, structure or portions thereof which may be converted to residential use pursuant to a special permit granted by a local planning agency. In the case of classes of buildings specified by paragraphs (iii) and (iv) of this subdivision and those buildings specified by paragraph (i) of this subdivision which require a minor modification or administrative certification, however, the provisions of subdivision one of section two hundred eighty-four of this article regarding compliance with this chapter shall not be applicable, but the other provisions of this article shall be applicable. Upon rezoning of any such study area or the granting of any such special permit, minor modification or administrative certification to permit residential use of any such building or portion thereof, subdivision one of section two hundred eighty-four of this article shall be applicable, with the timing of compliance requirements set forth in such section commencing to run upon the effective date of such rezoning or permit approval. If such rezoning does not permit residential use of the building or a portion thereof, or if a special permit, minor modification or administrative certification is denied, such building shall be exempt from this article.

3. In addition to the residents of an interim multiple dwelling, residential occupants in units first occupied after

April first nineteen hundred eighty and prior to April first, nineteen hundred eighty-one shall be qualified for protection pursuant to this article, provided that the building or any portion thereof otherwise qualifies as an interim multiple dwelling, an the tenants are eligible under the local zoning resolution for such occupancy. A reduction in the number of occupied residential units in a building after December first, nineteen hundred eighty-one shall not eliminate the protections of this article for any remaining residential occupants qualified for such protections. Non-residential space in a building as of the effective date of the act which added this article[1] shall be offered for residential use only after the obtaining of a residential certificate of occupancy for such space, and such space shall be exempt from this article, even if a portion of such building may be an interim multiple dwelling.

4. Interim multiple dwellings shall also include buildings, structures or portions thereof that had residential occupants on May first, nineteen hundred eighty-seven in units occupied residentially since December first, nineteen hundred eighty-one that were occupied for residential purposes since April first, nineteen hundred eighty and those units shall be qualified for protection pursuant to this article, provided that the building or any portion thereof meets the requirements set out in subdivision one of this section, regardless of whether the buildings, structures or portions thereof meets the requirements set out in paragraphs (i), (iii) and (iv) of subdivision two of this section.

§ 282. Establishment of special loft unit

In order to resolve complaints of owners of interim multiple dwellings and of residential occupants of such

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buildings qualified for the protection of this article, and to act upon hardship applications made pursuant to this article, a special loft unit referred to herein as the "loft board" shall be established which shall consist of from four to nine members representative of the public, the real estate industry, loft residential tenants, and loft manufacturing interests, and a chairperson, all to be appointed by the mayor of the municipality and to serve such terms as he may designate. The compensation of the members of the loft board shall be fixed by the mayor. The members of the loft board shall not be considered employees of the state or the municipality, provided, however, that state or municipal employees, or officers may be named to the loft board. The mayor shall establish the loft board within ninety days of the effective date of the act which added this article[1] The loft board shall have such office and staff as shall be necessary to carry out functions conferred upon it and may request and receive assistance from any state or municipal agency or department. The loft board shall have the following duties: (a) the determination of interim multiple dwelling status and other issues of coverage pursuant to this article; (b) the resolution of all hardship appeals brought under this article; (c) the determination of any claim for rent adjustment under this article by an owner or tenant; (d) the issuance, after a public hearing, and the enforcement of rules and regulations governing minimum housing maintenance standards in interim multiple dwellings (subject to the provisions of this chapter and any local building code), rent adjustments prior to legalization, compliance with this article and the hearing of complaints and applications made to it pursuant to this article; and (e) determination of controversies arising over the fair market value or a residential tenant's fixtures or reasonable moving expenses. The violation of any rule or regulation promulgated

by the loft board shall be punishable by a civil penalty determined by the loft board not to exceed one thousand dollars which may be recovered by the municipality by a proceeding in any court of competent jurisdiction. The loft board may charge and collect reasonable fees in the execution of its responsibilities. The loft board may administer oaths, take affidavits, hear testimony, and take proof under oath at public or private hearings.

§ 283. Occupancy permitted

Notwithstanding any other provision of this chapter or any other law code, rule or regulation, occupancy for residential purposes of residential units covered by this article is permitted, if such occupancy is in compliance with this article. Nothing contained herein shall be construed to limit local authorities from issuing vacate order for hazardous conditions, if appropriate.

§ 284. Owner obligations

1. (i) The owner of an interim multiple dwelling (A) shall file an alteration application within nine months from the effective date of the act which added this article[1], and (B) shall take all reasonable and necessary action to obtain an approved alteration permit within twelve months from such effective date, and (C) shall achieve compliance with the standards of safety and fire protection set forth in article seven-B of this chapter for the residential portions of the building within eighteen months from obtaining such alteration permit or eighteen months from such effective date, whichever is later, and (D) shall take all reasonable and necessary action to obtain a certificate of occupancy as a class A multiple dwelling for the

residential portions of the building or structure within thirty-six months from such effective date. The loft board may, upon good cause shown, and upon proof of compliance with the standards of safety and fire protection set forth in article seven-B of this chapter, twice extend the time of compliance with the requirement to obtain a residential certificate of occupancy for periods not to exceed twelve months each.

(ii) If there is a finding by the loft board that an owner has failed to satisfy any requirement specified in paragraph (i) of this subdivision, such owner shall be subject to all penalties set forth in article eight of this chapter.

(iii) In addition to the penalties provided in article eight of this chapter, if there is a finding by the loft board that an owner has failed to satisfy any requirement specified in paragraph (i) of this subdivision, a court may order specific performance to enforce the provisions of this article upon the application of three occupants of separate residential units qualified for the protection of this article, or upon the application of the municipality.

(iv) If, as a consequence of an owner's unlawful failure to comply with the provisions of paragraph (i) of this subdivision any residential occupant qualified for protection pursuant to this article is required to vacate his unit as a result of a municipal vacate order, such occupant may recover from the owner the fair market value of any improvements made by such tenant, and reasonable moving costs. Any vacate order issued as to such unit by a local government shall be deemed an order to the owner to correct the non-compliant conditions, subject to the provisions of this article. Furthermore, when such correction has been made such occupant shall have the

right to re-occupy his unit, and shall be entitled to all applicable tenant protections of this article.

(v) The occupants of a building shall, upon appropriate notice regarding the timing and scope of the work required, afford the owner reasonable access to their units so that the work necessary for compliance with this article can be carried out. Failure to comply with an order of the loft board regarding access shall be grounds for eviction of a tenant.

2. Every owner of an interim multiple dwelling, every lessee of a whole building part of which is an interim multiple dwelling, and every agent or other person having control of such a dwelling, shall, within sixty days of the effective date of the act which added this article[1], file with the loft board or any other authority designated by the mayor a notice in conformity with all provisions of section three hundred twenty-five of this chapter and with rules and regulations to be promulgated by the loft board.

§ 285. Owner protection

1. Notwithstanding the provisions of section three hundred two or three hundred twenty-five of this chapter, the owner of an interim multiple dwelling may recover rent payable from residential occupants qualified for the protection of this article on or after April first, nineteen hundred eighty, and maintain an action or proceeding for possession of such premises for non-payment of rent, provided that he is in compliance with this article.

2. Notwithstanding any other provision of this article, an owner may apply to the loft board for exemption of a

building or portion thereof from this article on the basis that compliance with this article in obtaining a legal residential certificate of occupancy would cause an unjustifiable hardship either because: (i) it would cause an unreasonably adverse impact on a non-residential conforming use tenant within the building or, (ii) the cost of compliance renders legal residential conversion infeasible. Residential and other tenants shall be given not less than sixty days notice in advance of the hearing date for such application. If the loft board approves such application, the building or portion thereof shall be exempt from this article, and may be converted to non-residential conforming uses, provided, however, that the owner shall, as a condition of approval of such application, agree to file an irrevocable recorded covenant in form satisfactory to the loft board enforceable for fifteen years by the municipality, that the building will not be re-converted to residential uses during such time. The standard for granting such hardship application for a building or portion thereof shall be as follows: (a) the loft board shall only grant the minimum relief necessary to relieve any alleged hardship with the understanding if compliance is reasonably possible it should be achieved even if it requires alteration of units, relocation of tenants to vacant space within the building, re-design of space or application for a non-use-related variance, special permit, minor modification or administrative certification; (b) self-created hardship shall not be allowed; (c) the test for cost infeasibility shall be that of a reasonable return on the owner's investment not maximum return on investment; (d) the test for unreasonably adverse impact on a non-residential conforming use tenant shall be whether residential conversion would necessitate displacement.

Such hardship applications shall be submitted to the loft board within nine months of the establishment of the loft board (or, in the case of interim multiple dwellings referred to in subdivision

four of section two hundred eighty-one of this chapter, within nine months of the effective date of that subdivision)[1], but shall not be considered, absent a waiver by the loft board, unless the owner has also filed an alteration application. In determination of any such hardship application, the loft board may demand such information as it deems necessary. In approving any such hardship application, the loft board may fix reasonable terms and conditions for the vacating of residential occupancy.

3. An owner of an interim multiple dwelling shall be exempt from paying a conversion contribution required by the zoning resolution of the city of New York for that portion of any building or structure determined by the loft board to be an interim multiple dwelling.

§ 286. Tenant protection

1. It shall not be a ground for an action or proceeding to recover possession of a unit occupied by a residential occupant qualified for the protection of this article that the occupancy of the unit is illegal or in violation or provisions of the tenant's lease or rental agreement because a residential certificate of occupancy has not been issued for the building, or because residential occupancy is not permitted by the lease or rental agreement.

2. Prior to compliance with safety and fire protection standards of article seven-B of this chapter, residential occupants qualified for protection pursuant to this article shall be entitled to continued occupancy, and shall pay the same rent, including escalations, specified in their lease or rental agreement to the extent to which such lease or rental agreement remains in effect or, in the absence of a lease or rental agreement, the same rent most recently paid and accepted by

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the owner; if there is no lease or other rental agreement in effect, rent adjustments prior to article seven-B compliance shall be in conformity with guidelines to be set by the loft board for such residential occupants within six months from the effective date of this article[1].

3. Upon or after compliance with the safety and fire protection standards of article seven-B of this chapter, an owner may apply to the loft board for an adjustment of rent based upon the cost of such compliance. Upon approval by the loft board of such compliance, the loft board shall set the initial legal regulated rent, and each residential occupant qualified for protection pursuant to this article shall be offered a residential lease subject to the provisions regarding evictions and regulation of rent set forth in the emergency tenant protection act of nineteen seventy-four,[2] except to the extent the provisions of this article are inconsistent with such act. At such time, the owners of such buildings shall join a real estate industry stabilization association in accordance with such act.

4. The initial legal regulated rent established by the loft board shall be equal to (i) the rent in effect, including escalations, as of the date of application for adjustment ("base rent"), plus, (ii) the maximum annual amount of any increase allocable to compliance as provided herein; and (iii) the percentage increase then applicable to one, two or three year leases as elected by the tenant, as established by the local rent guidelines board, and applied to the base rent, provided, however, such percentage increases may be adjusted downward by the loft board if prior increases based on loft board guidelines cover part of the same time period to be covered by the rent guidelines board adjustments.

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5. An owner may apply to the loft board for rent adjustments once based upon the cost of compliance with article seven-B of this chapter and once based upon the obtaining of a residential certificate of occupancy. If the initial legal regulated rent has been set based only upon article seven-B compliance, a further adjustment may be obtained upon the obtaining of a residential certificate of occupancy. Upon receipt of such records as the loft board shall require, the loft board shall determine the costs necessarily and reasonably incurred, including financing, in obtaining compliance with this article pursuant to a schedule of reasonable costs to be promulgated by it. The adjustment in maximum rents for compliance with this article shall be determined either (i) by dividing the amount of the cash cost of such improvements exclusive of interest and service charges over a ten year period of amortization, or (ii) by dividing the amount of the cash cost of such improvements exclusive of interest and service charges over a fifteen year period of amortization, plus the actual annual mortgage debt service attributable to interest and service charges in each year of indebtedness to an institutional lender, or other lender approved by the loft board, incurred by the owner to pay the cash cost of the improvements, provided that the maximum amount of interest charged includable in rent shall reflect an annual amortization factor of one-fifteenth of the outstanding principal balance. Rental adjustments to each residential unit shall be determined on a basis approved by the loft board. An owner may elect that the loft board shall deem the total cost of compliance with this article to be the amounts certified by the local department of housing preservation and development of such municipality in any certificate of eligibility issued in connection with an application for tax exemption or tax abatement to the extent such certificate reflects categories of

costs approved by the loft board as reasonable and necessary for such compliance. Rental adjustments attributable to the cost of compliance with this article shall not become part of the base rent for purposes of calculating rents adjusted pursuant to rent guidelines board increases.

6. Notwithstanding any provision of law to the contrary, a residential tenant qualified for protection pursuant to this chapter may sell any improvements to the unit made or purchased by him to an incoming tenant provided, however, that the tenant shall first offer the improvements to the owner for an amount equal to their fair market value. Upon purchase of such improvements by the owner, any unit subject to rent regulation solely by reason of this article and not receiving any benefits of real estate tax exemption or tax abatement, shall be exempted from the provisions of this article requiring rent regulation if such building had fewer than six residential units as of he effective date of the act which added this article[1], or rented at market value subject to subsequent rent regulation if such building had six or more residential units at such time. The loft board shall establish rules and regulations regarding such sale of improvements which shall include provisions that such right to sell improvements may be exercised only once for each unit subject to this article, and that the opportunity for decontrol or market rentals shall not be available to an owner found guilty by the loft board of harassment of tenants.

7. The local rent guidelines board shall annually establish guidelines for rent adjustments for the category of buildings covered by this article in accordance with the standards established pursuant to the emergency tenant protection act of nineteen seventy-four[2]. The local rent guidelines board shall consider the necessity of a separate

category for such buildings, and a separately determined guideline for rent adjustment for those units in which heat is not required to be provided by the owner, and may establish such separate category and guideline. The loft board shall annually commission a study by an independent consultant to assist the rent guidelines board in determining the economics of loft housing.

8. Cooperative and condominium units occupied by owners or tenant-shareholders shall not be subject to rent regulation pursuant to this article.

9. No eviction plan for conversion to cooperative or condominium ownership for a building which is, or a portion of which is an interim multiple dwelling shall be submitted for filing to the department of law pursuant to the general business law until a residential certificate of occupancy is obtained as required by this article, and the residential occupants qualified for protection pursuant to this article are offered one, two or three year leases, as elected by such persons, in accordance with the provisions for establishment of initial legal regulated rent contained herein. Non-eviction plans for such buildings may be submitted for filing only if the sponsor remains responsible for compliance with article seven-B and for all work in common areas required to obtain a residential certificate of occupancy. Cooperative conversion shall be fully in accordance with section three hundred fifty-two-eeee of the general business law, the requirements of the code of the local real estate industry stabilization association, and with the rules and regulations promulgated by the attorney general.

10. The functions of the local conciliation and appeals board of such municipality regarding owners and tenants

subject to rent regulation pursuant to this article shall be carried out by the loft board until such time as provided otherwise by local law.

11. Residential occupants qualified for protection pursuant to this article shall be afforded the protections available to residential tenants pursuant to the real property law and the real property actions and proceedings law.

12. No waiver of rights pursuant to this article by a residential occupant qualified for protection pursuant to this article made prior to the effective date of the act which added this article[1] shall be accorded any force or effect; however, subsequent to the effective date an owner and a residential occupant may agree to the purchase by the owner of such person's rights in a unit.

13. The applicability of the emergency tenant protection act of nineteen seventy-four[2] to buildings occupied by residential tenants qualified for protection pursuant to this article shall be subject to a declaration of emergency by the local legislative body. In the event such act expires prior to the expiration of this article[3], tenants in interim multiple dwellings shall be included in coverage of the rent stabilization law of nineteen hundred sixty-nine of the city of New York[5].

§ 287. Alternative compliance

In any case in which a local building code or this chapter provides an alternative means of meeting the fire and safety standards of article seven-B of this chapter, an owner of an interim multiple dwelling may, to the extent permitted by such local code or this chapter, elect to comply with the

standards of such code or this chapter rather than with article seven-B. Such an election shall not affect an owner's obligations to meet the deadlines for compliance set forth in this article, and in such cases references herein to article seven-B shall be deemed to include any such local building code or the applicable provisions of this chapter.

* * *

MULTIPLE DWELLING LAW

§ 301. Certificate of compliance or occupancy

1. No multiple dwelling shall be occupied in whole or in part until the issuance of a certificate by the department that said dwelling conforms in all respects to the requirements of this chapter, to the building code and rules and to all other applicable law, . . .

* * *

2. Except as above provided, no dwelling constructed as or altered or converted into a multiple dwelling after April eighteenth, nineteen hundred twenty-nine, shall be occupied in whole or in part until the issuance of a certificate of compliance or occupancy.

* * *

§ 302. Unlawful occupation

1. a. If any dwelling or structure be occupied in whole or in part for human habitation in violation of section three hundred one, during such unlawful occupation any bond or

note secured by a mortgage upon said dwelling or structure, or the lot upon which it stands, may be declared due at the option of the mortgagee.

b. No rent shall be recovered by the owner of such premises for said period, and no action or special proceeding shall be maintained therefor, or for possession of said premises for non-payment of such rent.

c. During such period the department in charge of water supply shall not permit water to be furnished in any such dwelling or structure and said premises shall be deemed unfit for human habitation, and the department of health or the department charged with the enforcement of this chapter shall cause them to be vacated.

* * *

§ 304. Penalties for violations

1. Except as otherwise in this section specifically provided, every person who shall violate or assist in the violation of any provision of this chapter shall be guilty of a misdemeanor punishable, for a first offense, by a fine of not exceeding five hundred dollars or by imprisonment for a period of not exceeding thirty days, or by both such fine and imprisonment; for the second and any subsequent offense arising from the failure to remove the violation upon which the first offense was based, by a fine of not exceeding one thousand dollars or by imprisonment for a period of not exceeding six months, or by both such fine and imprisonment.

* * *

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§ 306. Judicial procedure and orders

1. In case any multiple dwelling or structure or any part thereof or the lot on which it is situated is constructed, altered, converted or maintained in violation of any provision of this chapter or of any order or notice of the department, or in case a nuisance exists in any such dwelling or structure or part thereof or upon the lot on which it is situated, the department may institute any appropriate action or proceeding to prevent such unlawful construction, alteration, conversion or maintenance, to restrain, correct or abate such violation or nuisance, to prevent the occupation of said dwelling or structure or any part thereof, or to prevent any illegal act, conduct or business in or about such dwelling, structure or lot.

2. In any such action or proceeding the department may, by affidavit setting forth the facts, apply to the supreme court, or to any justice thereof, or, if the premises in respect to which the action is brought are situated in the city of New York, to the New York city civil court, for:

a. An order granting the relief for which said action or proceeding is brought, or enjoining all persons from doing or permitting to be done any work in or about such dwelling, structure or lot or any part thereof, or from occupying or using the same for any purpose, until the entry of final judgment or order.

b. An order authorizing the department to execute and carry out the provisions of any notice or order which is issued by the department and not complied with, to remove any violation specified in such notice or order, or to abate any nuisance in or about such dwelling, structure or lot.

* * *

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§ 309. Repairs, vacation and demolition of buildings.

1. a. The term "nuisance" shall be held to embrace public nuisance as known at common law or in equity jurisprudence. Whatever is dangerous to human life or detrimental to health, and whatever dwelling is overcrowded with occupants or is not provided with adequate ingress and egress or is not sufficiently supported, ventilated, sewered, drained, cleaned, or lighted in reference to its intended or actual use, and whatever renders the air or human food or drink unwholesome, are also severally, in contemplation of this law, nuisances. All such nuisances are unlawful.

b. Whenever the department shall certify that any multiple dwelling, or any part of its premises, or the plumbing, sewerage, drainage, lighting or ventilation thereof, is in a condition or in effect dangerous to life or health, the department may, after giving notice to the owner and an opportunity to be heard at a hearing held for such purpose declare the same, to the extent it may specify, a public nuisance. . . .

* * *

c. The department may order or cause such nuisance to be removed, abated, suspended, purified, altered, repaired or otherwise improved as the order shall specify.

d. The department may order or cause any multiple dwelling or any part of its premises, or any excavation, structure, sewer, plumbing, pipe, passage, matter or thing in or about such premises to be purified, cleansed, disinfected, removed, altered, repaired or improved.

APPENDIX H — LOFT BOARD REGULATIONS

LOFT BOARD

PURSUANT TO
SECTION 1105 OF THE
NEW YORK CITY CHARTER, Article 7-C of the Multiple Dwelling Law, and Mayor's Executive Order No. 66, The New York City Loft Board hereby promulgates the following Rules and Regulations Relating to Processing of Hardship Applications pursuant to Section 285(2) and the Charging and Collection of Fees pursuant to Section 282 of the Multiple Dwelling Law.

I. *Procedures*

A. *Who May File*

1. The owner of an interim multiple dwelling registered with the Loft Board may file an application for exemption of a building or portion thereof from Article 7-C of the Multiple Dwelling Law on the basis that compliance in obtaining a residential certificate of occupancy would cause hardship for any of the reasons set forth in Section II below.

2. A lessee of a whole building, any portion of which is an interim multiple dwelling registered with the Loft Board, may file an application for exemption from Article 7-C, provided that no application filed by a lessee shall be considered by the Loft Board unless the owner of the building consents in writing to the filing of such application.

3. A duly authorized agent (including the attorney) of the owner of an interim multiple dwelling registered with the Loft Board may file an application for exemption on behalf of the owner.

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B. *Filing Deadline*

1. Notices of application for exemption due to hardship for a building or portion thereof must be submitted to the Loft Board by no later than June 30, 1983 pursuant to Section 285(2) of the Multiple Dwelling Law. Such notices shall be filed by letter from the owner, lessee of the whole building or agent and shall only be accepted for buildings registered or which by June 30, 1983 had applied to register as interim multiple dwellings with the Loft Board.

2. The applicant must perfect his/her/its application by no later than October 31, 1983.

C. *Perfecting Hardship Applications*

1. An application shall only be accepted for a building with a current interim multiple dwelling registration.

2. The application shall be in a form acceptable to the Loft Board and shall be consistent with the requirements of these regulations, the Board's regulations relating to applications to the Board (Regulations for Internal Procedures - Section VI, paragraphs 16-25), and to fees (Section 4.B.2.). The applicant must provide all information necessary or appropriate by no later than October 31, 1983 in order for the application to be considered. An additional time period of no more than sixty days for the submission of all required documentation in support of the completed application may be requested and will be granted if good cause is shown. The applicant must indicate the basis for the application, the residential units for which exemption is being applied for, and the specific claims for exemption being made. In addition,

supporting data must be provided with the application whenever necessary or appropriate to fully set forth to explain the basis for the application.

3. In processing the application, the Loft Board may demand such additional information as it deems necessary or appropriate in making a determination. Failure of the applicant to provide any such information required by the Loft Board may result in the denial of the application.

4. Applications for exemption shall not be considered unless the owner has also filed an alteration application with the Department of Buildings. A copy of such alteration application must accompany each hardship application including two copies of the submitted plans and such additional copies of the plans as the Board may require. The Loft Board may vote to waive the requirement that an alteration application be filed and proceed with the consideration of the application for exemption. The approval of such a waiver shall apply only to the consideration of a hardship application and shall in no way affect the owner's obligation to file an alteration application for all other purposes as required by Section 284 of the Multiple Dwelling Law.

a. In deciding whether to waive the requirements that an alteration application be filed, the Board will consider the following criteria: (i) whether the information that would be contained in the alteration application is already available in other records or could be made available in an alternate form acceptable to the Board; and (ii) whether hardship can be proved without the information contained in the alteration application.

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5. Processing of an owner's application for exemptions shall be in accordance with the rules regarding application to the Board (Regulations for Internal Board Procedures - Section VI, paragraphs 16-25), except as set forth below. These rules provide for the service of the application on all affected parties, opportunity to answer in writing, and the conducting of informal conferences and administrative hearings.

If a perfected application appears to the staff to be well founded, there shall be conducted an administrative hearing following notice as provided pursuant to Internal Board Procedures at least sixty days in advance of the hearing date.

II. *Processing of Application for Exemption Due to Hardship*

A. *Basis for Application*

The basis for applying for an exemption due to hardship is that compliance with Article 7-C of the Multiple Dwelling Law in obtaining a legal residential certificate of occupancy would cause cause hardship for one of the following two reasons.

1. *Adverse Impact* - Compliance would cause an unreasonably adverse impact on a non-residential conforming use occupant existing on June 21, 1982 within the building.

2. Infeasible Costs - The cost of compliance would render legal residential conversion financially infeasible.

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B. *Appropriate Tests*

1. *Adverse Impact* - The test for unreasonably adverse impact on a non-residential conforming use occupant existing on June 21, 1982 shall be whether legal residential conversion would necessitate displacement of such occupant. An owner making a claim on this basis will be required to produce as part of the application, evidence to substantiate the claim. Displacement of non-residential conforming use occupants, may include instances where: (i) all or a critical portion, adversely affecting the conduct of business, of the space of an existing non-residential conforming use occupant would be lost as a result of the residential conversion; (ii) the nature of an existing non-residential conforming use would render legal residential conversion to be infeasible or illegal by causing an imminent peril to the health and safety of residential occupants; (iii) the result of the legal residential conversion would be unreasonably disruptive to the business of the non-residential conforming use; or (iv) the inability of an owner who purchased the building before June 21, 1982 to expand his/her/its business which is an existing non-residential conforming use due to legal residential conversion would result in the elimination of existing jobs.

2. *Infeasible Costs* - The test for cost infeasibility shall be that the owner would be unable to attain a reasonable return on his/her/its investment; not maximum return on investment.

(a) Reasonable rate of return on the owner's investment shall be defined as a net annual return of five percent or more where net annual return is the percentage

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amount by which the annual gross earned income from the building exceeds the annual operating expenses of the building.

(b) Earned income shall mean the maximum annual collectible rent for the building, including any and all escalators, for both residential and non-residential units, plus miscellaneous income from all other sources in the building including vending machines, and sign rentals. The Loft Board shall impute a rental value for vacant units or units occupied either residentially or non-residentially by the landlord, any member of the landlord's family or an employee of the landlord, at the fair market value for the space, or if subject to Article 7-C at the maximum legal rent.

(c) Operating expenses shall consist of the actual, reasonable cost of: fuel, labor, utilities, taxes other than income or corporate franchise taxes, fees, permits, necessary contracted services and non-capital repairs, insurance, parts and supplies, management fees and other administrative costs and interest on a bona fide mortgage. Criteria to be considered in determining a bona fide mortgage other than an institutional mortgage shall include: condition of the property, location of the property, the existing mortgage market at the time the mortgage is placed, the term of the mortgage, security and other terms and conditions of the mortgage.

(d) No application shall be approved unless the owner's equity in such building exceeds five percent of: (i) the arms length purchase price of the property; (ii) the cost of any capital improvement for which the owner has not collected or will not collect a surcharge; (iii) any repayment of principal of any mortgage or loan used to finance the purchase of the property or, any capital improvement for which the owner has

not collected or will not collect a surcharge; and (iv) any increase in the equalized assessed value of the property after purchase by the owner. For the purposes of this paragraph, owner's equity shall mean the sum of (i) the purchase price of the property less the principal of any mortgage or loan used to finance the purchase of the property, (ii) the cost of any capital improvement for which the owner has not collected or will not collect a surcharge less the principal of any mortgage or loan used to finance said improvement, (iii) any repayment of the principal of any mortgage or loan used to finance the purchase of the property or any capital improvement for which the owner has not collected or will not collect a surcharge, and (iv) any increase in the equalized assessed value of the property which occurred subsequent to the first valuation of the property after purchase by the owner.

An owner making a claim on this basis will be required to produce, as part of the application, evidence, subject to audit, based on a representative consecutive 12 month period beginning no earlier than January 1, 1982, of the current net annual return for the building and the projected net annual return following legalization including, but not limited to, current and projected earned income, operating expenses and equity information.

Inability to make a reasonable return on investment may include situations where the necessary and reasonable costs of compliance will cause residential units to rent at above prevailing market levels.

C. *Processing Guidelines*

1. Applications for exemption due to hardship will not be granted if the result of self-created hardship.

2. Applications for exemption due to hardship will not be granted if compliance can be reasonably achieved through:

(i) alteration of units,

(ii) relocation of tenants (residential or non-residential conforming use) to vacate space within the building,

(iii) re-design of space, or

(iv) application for a non-use related variance, special permit, minor modification or administrative certification.

Owners filing hardship application shall be required to make a reasonable attempt to cooperate with the tenants to achieve compliance through the methods listed above.

3. In considering such application, the Loft Board shall require the owner and tenants to consider constructive suggestions for alternatives to the proposed legalization plan, which would allow for a minimum vacating of residential occupancy, without adversely affecting existing non-residential conforming uses.

III. *Granting of Applications*

A. In resolving applications for exemption due to hardship, the Loft Board shall grant only the minimum relief necessary to relieve any hardship.

B. If the Loft Board approves an application for exemption due to hardship, the building or portion thereof for

which the application is approved shall be exempt from Article 7-C of the Multiple Dwelling Law and may be converted to non-residential uses which must be in conformance with the zoning resolution and compatible with existing residential use. As a condition of approval of such application, the owner shall file with the Loft Board a certified copy of an irrevocable recorded covenant in form satisfactory to the Loft Board enforceable by the City of New York for fifteen (15) years from the date of the recording, that the building or portion thereof for which the hardship exemption has been granted will not be re-converted to residential uses during that time.

When the Loft Board approves such an application, the owner will be notified of the Board's intent to approve the application and will be afforded an opportunity of no more than 90 days to file the required covenant. The Loft Board will issue its final order approving the application following receipt of the certified copy of the covenant. If proof of the filing of the required covenant is not filed with the Loft Board within 90 days, the application will be denied and the owner will be required to comply with Article 7-C of the Multiple Dwelling Law.

C. If the hardship exemption is granted for a portion of the building, the IMD status for such building and the remaining residential units, covered under Article 7-C of the Multiple Dwelling Law in such building, shall not be affected, even if there are less than three qualified units remaining.

D. In approving an exemption application due to hardship, the Loft Board may fix reasonable terms and conditions regarding the owner's payment to the residential occupant of any reasonable moving costs and the fair market

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value of any improvements made or purchased by the residential occupant; and a reasonable time period for relocation, not to exceed one year.

Amendment to the Fee Regulation

Section 4. Fees

B. 2. *Hardship Applications* - the filing fee for an exemption application due to hardship shall be $1,000 for each building or portion thereof for which the application is filed. The fee must be paid by no later than October 31, 1983, the deadline for perfection of hardship applications.

Explanation

These regulations will establish procedures and criteria for processing hardship applications made to the Loft Board pursuant to Section 285(2) and will establish a filing fee for hardship applications pursuant to Section 282 of Article 7-C of the Multiple Dwelling Law.

I do hereby certify that good cause exists for waiving the requirement that thirty days shall first elapse after publication in THE CITY RECORD and that the foregoing Regulations shall become effective on the date of publication.

Dated: August 19, 1983

Filed with the City Clerk: August 26, 1983

s/s Carl B. Weisbrod
CARL B. WEISBORD
CHAIRMAN

APPENDIX I — EXCERPTS OF THE UNITED STATES CONSTITUTION

Article I

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

* * *

Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX J — OPINION IN *902 ASSOCIATES, LTD. v. TOTAL PICTURE CREATIVE SERVICES, INC. AND PETER SCHNEIDER*

144 Misc.2d 316

902 ASSOCIATES, LTD.,
Petitioner-Landlord-Appellant,

v.

TOTAL PICTURE CREATIVE SERVICES, INC.
and Peter Schneider
Respondents-Tenants-Respondents.

Supreme Court, Appellate Term,
First Department.

July 6, 1989.

* * *

Before OSTRAU, P.J., and SANDIFER and McCOOE, JJ.

PER CURIAM:

Order entered December 23, 1987 (Taylor, J.) affirmed, with $10 costs.

[1] The issue is whether compliance with Multiple Dwelling Law section 284, subdivision 1 must be pleaded and proven in order to successfully maintain a nonpayment proceeding against an occupant of an interim multiple dwelling. We hold that it must.

This nonpayment summary proceeding was brought upon a petition which alleges the status of the building

premises as an "interim multiple dwelling" under Article 7-C of the Multiple Dwelling Law. The premises were originally registered with the Loft Board in November, 1983.

While the owner of an interim multiple dwelling may recover rent from residential loft occupants notwithstanding the rent-forfeiture provisions of the Multiple Dwelling Law applicable to owners of dwellings occupied without a certificate of occupancy, this right is contingent upon the loft building owner's "compliance" with Multiple Dwelling Law section 284 (see MDL §285, subd. 1). One of the primary "owner obligations" under section 284 is the filing and/or obtaining of appropriate alteration applications and permits, and the taking of "all reasonable and necessary action" to obtain a certificate of occupancy within 36 months from June 21, 1982, the effective date of the Loft Law (MDL §284, subd. 1[i]). The petition does not allege the requisite compliance with the Loft Law's owner obligations and is jurisdictionally defective (see *Blackgold Realty Corp. v. Milne*, 69 N.Y.2d 719, 512 N.Y.S.2d 25, 504 N.E.2d 392). Moreover, it is undisputed that the owner has not complied with the time requirements of section 284. There is no showing that the owner has taken any steps to bring the subject premises into compliance.

[2] The owner's argument that mere registration of the building as an interim multiple dwelling entitles it to collect rent misperceives the goal underlying the statutory scheme. The Loft Law permits actions for rent in the absence of a residential certificate of occupancy but the owner is required to move forward on his plans to legalize the premises within the time periods specified in the statute. The law does not contemplate a situation where owners will be permitted to collect rent while the building languishes indefinitely as an "interim" multiple

dwelling. At some point — and the statute expressly defines the time period — an "interim" multiple dwelling must be upgraded to a class A multiple dwelling. To the extent an owner requires extensions of the time to comply, or to the extent the cost of compliance renders legal residential conversion infeasible, an owner is authorized to apply to the Loft Board for relief (MDL § 284, subd. 1[i]; § 285, subd. 2).

We appreciate that this is not an isolated case and that the dynamics of loft conversion are such that there are many dwellings which have not been legalized in conformity with the time schedule originally set by the Legislature. Any claimed inequities should be addressed to the Legislature. This Court is charged with enforcing the statute as written. The language of the statute setting forth a timetable is clear and unequivocal and not subject to judicial interpretation.

Accordingly, inasmuch as the owner has failed to allege or demonstrate compliance with Multiple Dwelling Law § 284, subd. 1, a nonpayment summary proceeding may not be maintained and the petition was properly dismissed by the Civil Court.

OSTRAU, P.J., dissents in the accompanying memorandum.

OSTRAU, Presiding Justice, dissenting.

I respectfully dissent and would reverse the order appealed from and reinstate the petition in this non-payment proceeding.

By virtue, inter alia, of the acute housing shortage in this City, residential tenants, particularly during the 1970's,

gravitated to space available in commercial loft buildings. Many of these "loft tenants" entered into conventional commercial loft leases which were little more than contrivances calculated to disguise the residential use to be made of the premises.

Multiple Dwelling Law §§ 301 and 302 forbid an owner from recovering rent from tenants of a multiple dwelling which lacks a valid certificate of occupancy. In *Lipkis v. Pikus*, 99 Misc.2d 518, 416 N.Y.S.2d 694 (Riccobono, J. dissenting) [AT1], affd. 72 A.D.2d 697, 421 N.Y.S.2d 825, lv. to app. denied 51 N.Y.2d 874, 433 N.Y.S.2d 1019, 414 N.E.2d 399, the Appellate Term, First Department confronted some of the anomalies arising from the residential use of commercial loft premises. Recognizing that landlords and tenants had to some extent acted in concert in unlawfully converting commercial loft premises to residential use, the Appellate Term majority reversed the dismissal of non-payment proceedings notwithstanding tenants' assertion and proof that the premises there at issue lacked valid residential certificates of occupancy. Indeed, in Lipkis, the Appellate Term majority (in spite of the proscription of MDL §§ 301 and 302 against a landlord's recovering of rent from tenants of a multiple dwelling lacking a valid certificate of occupancy) awarded final judgment in favor of the landlord, stayed that judgment until such time as the landlord obtained valid certificates of occupancy, and directed the tenants to deposit with the Clerk of the Court of original jurisdiction any and all arrears in rent as well as accruing use and occupancy at the rate previously payable as rent, with those funds to be released to the landlord upon his securing residential certificates of occupancy. In so doing, the Appellate Term majority observed:

"The pervasive extent of the problem confronting

> us is best illustrated by a report of the Department of City Planning (received in evidence) indicating that fewer than 10% of the industrial buildings located in Manhattan which have undergone total or partial conversion have valid certificates of occupancy for residential use. It seems obvious that the Multiple Dwelling Law provision under review did not envision a situation involving wholesale conversion of commercial properties precipitated by shifting patterns of industrial use and a resurgent demand for mixed residential/commercial space. In this context, we are not persuaded that the implicit condonation of widespread rent withholding actions, or "strikes", is the most feasible and equitable alternative to bring converted properties within the applicable multiple dwelling guidelines. That goal would be better achieved by the more stringent enforcement of building and zoning standards by the appropriate city agencies. In our discretion, however, we have conditioned enforcement of the final judgment granted herein upon petitioner's procurement of the requisite certificate of occupancy. We view this relief as giving balance to the competing interests of both parties by avoiding unjust enrichment to the tenants and stimulating expeditious completion of the actions necessary to legalize the conversion.", (Lipkis v. Pikus, 99 Misc.2d 518, 520-521, 416 N.Y.S.2d 694 [AT1]).

The Appellate Term's formulation in the Lipkis case has been superseded by the passage of Article 7-C of the Multiple Dwelling Law (§§ 280-287) [L.1982, C. 349, § 1]. MDL § 280, characterizes the public emergency giving rise to the enactment of Multiple Dwelling Law Article 7-C, and further provides:

> ....the intervention of the state and local

> governments is necessary to effectuate legalization.... of the present illegal living arrangements in such "de facto" multiple dwellings, and to establish a system whereby residential rentals can be reasonably adjusted so that residential tenants can assist in paying the cost of such legalization without being forced to relocate; that in order to prevent uncertainty, hardship, and dislocation, the provisions of this article are necessary and designed to protect the public health, safety and general welfare.

To maintain existing rent rolls of interim multiple dwellings, MDL § 285(l) was promulgated to provide:

> Notwithstanding the provisions of section three hundred two or three hundred twenty-five of this chapter, the owner of an interim multiple dwelling may recover rent payable from residential occupants qualified for the protection of this article on or after April first, nineteen hundred eighty, and maintain an action or proceeding for possession of such premises for non-payment of rent, provided that he is in *compliance* with this article. (emphasis added)

The instant proceeding was dismissed by the court of original jurisdiction upon the ground that notwithstanding the issuance of an interim multiple dwelling registration number for the premises, the landlord was not in "compliance" with MDL Article 7-C. MDL § 284 provides, inter alia, a schedule for owners of interim multiple dwellings to legalize their premises. Admittedly, the landlord in the instant proceeding has failed to meet the statutory schedule for securing a residential certificate of occupancy for the premises, and because of that failure the court of original jurisdiction concluded that the landlord is not in "compliance" with MDL Article 7-C and thus not entitled to maintain this non-payment proceeding against the tenant (MDL §285[1]).

However, to so strictly construe MDL § 285, subdivision 1, is to ignore the ramifications of MDL § 282, wherein the legislature provided for the creation of a "loft board" to assume jurisdiction over the myriad complexities which confront landlords of loft premises in meeting their obligation to secure residential certificates of occupancy for their premises. Very few interim multiple dwellings in this City have been legalized, and of those few that have been legalized, most are cooperative premises in which the proprietary's lessees have had an obvious economic incentive to undertake such legalization.

The simple fact of the matter is that the Appellate Term majority, in affirming the dismissal of this non-payment proceeding, has now jeopardized the rent roll of almost every interim multiple dwelling in this City. The majority's holding in this case is manifestly more restrictive than even the Appellate Term's earlier formulation in the Lipkis case, and it raises the specter of bankruptcy for most interim multiple dwellings. To my view, the majority's holding represents an overly restrictive construction of Article 7-C, particularly since Article 7-C is primarily designed to guarantee the rent roll so necessary if services are to be provided and if the orderly legalization of interim multiple dwellings is to proceed. It is most significant that the loft board itself, with its broad powers to regulate interim multiple dwellings, has not suggested that the tenants of the interim multiple dwellings which have not been legalized in accordance with the schedule provided by MDL § 284(1) which as indicated above constitute the vast majority of interim multiple dwellings in this City are now completely relieved of the obligation to pay rent.

The tenant in this proceeding has not suggested that the

landlord has failed to provide services or that the premises have deteriorated. To my view, and in the absence of a determination by the loft board to the contrary, the landlord is entitled to recover rent for the premises at issue and to maintain this nonpayment proceeding, (cf., *Corris v. 129 Front Co.*, 85 A.D.2D 176, 447 N.Y.S.2D 480 [Sandler, J. dissenting in part]). To suggest, as does the majority, that the answers to the immediate questions raised by this appeal are to be found in the legislature, is to defer to the problematic, to defy experience and to afford no relief for the significant dislocation which the majority's holding will certainly cause.

APPENDIX K — OPINION IN *COUNTY DOLLAR CORPORATION v. ELISE DOUGLAS, et al.*

COUNTY DOLLAR CORPORATION,
Petitioner-Landlord-Appellant,

v.

Elise DOUGLAS et al.,
Respondents-Tenants-Respondents.

Supreme Court, Appellate Division,
First Department.

April 19, 1990.

* * *

Before KUPFERMAN, J.P., and ROSS, ROSENBERGER and WALLACH, JJ.

MEMORANDUM DECISION.

Order, Appellate Term, First Department (Stanley S. Ostrau, P.J., Stanley Parness, Edith Miller, JJ), entered July 18, 1989, which affirmed an Order, Civil Court, New York County (Bruce J. Gould, J.) entered May 18, 1988, unanimously affirmed, without costs.

Petitioner, owner of an interim multiple dwelling, commenced non-payment proceedings against loft tenants. The Civil Court dismissed the petitions at the close of petitioner's case for failure to comply with an owner's obligation pursuant to MDL § 284(1)(i). Petitioner appealed and the Appellate Term affirmed on the basis of the majority opinion in *902 Assoc. v. Total Picture Creative Services*, 144 Misc.2d 316, 547 N.Y.S.2d 978 (Ostrau, P.J., dissenting). We agree.

Appendix K

[1,2] Article 7-C of the Multiple Dwelling Law (the "Loft Law") balances the interests of loft tenants and owners. While the statute allows owners to collect rent despite the lack of an appropriate certificate of occupancy, it specifically conditions that relief upon compliance by the owner with the Loft Law (MDL § 285). The statute sets forth such obligations to legalize a covered loft building (MDL § 284). Petitioner contends that a non-payment proceeding may be maintained upon a showing of compliance with the registration requirement (MDL § 284[2]) and a reasonable attempt to comply with the four step legalization procedure of MDL § 284(1)(i). An attempt is insufficient, although we are informed that subsequent to the non-jury trial, additional actions were taken by the petitioner-landlord which could establish compliance, and we do not foreclose a further proceeding to so establish. An owner must prove compliance with legalization requirements in order to maintain a non-payment proceeding (*Lower Manhattan Loft Tenants v. New York City Loft Board*, NYLJ, August 15, 1984, p. 11, col. 1 [Sup.Ct., NY Co.]; *Cobra Resources, Inc. v. Dumpl, Inc.*, 138 Misc.2d 91, 522 N.Y.S.2d 433; *Greeting Card Publishers, Inc. v. Spencer*, 141 Misc.2d 800, 534 N.Y.S.2d 636; *902 Associates Ltd. v. Total Picture Creative Services, Inc., supra.*) Strict adherence is necessary to satisfy the public policy considerations recognized by the Legislature to protect the life, health and safety of tenants and the integrity of zoning regulations. Although the statute also contains provisions for exemption of owners due to financial hardship (MDL § 285[2]), petitioner never made a hardship application.

[3] Nor is a finding of non-compliance by the Loft Board a prerequisite to a determination of non-compliance by a Court of competent jurisdiction. While the Loft Board may

subject an owner to penalties upon such a finding (MDL § 284[1][ii]), the statute does not make such a finding a necessary predicate. Unless the Legislature has expressed an explicit intention to vest exclusive original jurisdiction in the administrative agency, the Court will be held to have concurrent jurisdiction (2 *NY Jur 2d* Administrative Law, §§ 178-80). Finally, the statute sets forth no obligation for tenants to post rent monies with the Court to protect an owner's property interest.

APPENDIX L — NEW YORK TIMES ARTICLE

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May 25, 1986, Sunday Late City Final Edition

SECTION: Section 8; Page 7, Column 1; Real Estate Desk

LENGTH: 1012 words

HEADLINE: City Drafts Formal Rules for Living in Artists' Lofts

BYLINE: By Michael deCourcy Hinds

BODY:

TO live in one of the 3,500 lofts in NoHo, residents must be artists and they are supposed to prove it to the Department of Cultural Affairs, which recently drafted regulations based on the informal procedure it has used since 1971.

"These are the first formal regulations we have proposed," said Susan B. Rothschild, counsel to the department. "They are basically a codification of existing procedures. Our goal was to encourage anybody in the fine arts to apply."

City and community surveys indicate that a third of the residents in the two sections are certified artists and that the majority of the remaining residents are qualified artists who have not applied for certification.

Most of the nonartist residents, with exceptions based

on the length and location of their residence, are living in SoHo or NoHo illegally. The city has not enforced this zoning provision, but many tenants seek certification to prevent landlords from using their illegal status as grounds for eviction.

SoHo is the area south of Houston Street to Canal Street and bounded by West Broadway on the west and Lafayette Street on the east. NoHo is the area north of Houston Street to Astor Place, from Broadway on the west to the Bowery and Mulberry Street on the east.

Artists and tenants generally welcome the issuance of regulations.

"It's high time for them to codify something," said Chuck DeLaney, a photographer and a tenant representative on the city's Loft Board, which regulates about 7,000 city lofts. "For 15 years, this has been part of the oral tradition. How to become a certified artist is like trying to find out how to get to heaven — you always had to take somebody's word for it."

Certification is required by the city's zoning resolution, which permits artists to live and work in SoHo and NoHo, manufacturing-zoned districts. The State Legislature made this arrangement possible in 1964, when it amended the Multiple Dwelling Law to permit joint living-working quarters for artists in commercial and industrial lofts in locally designated areas.

The state law defines an artist as "a person regularly engaged in the fine arts, such as painting and sculpture, or in the performing or creative arts, including choreography and filmmaking, or in the composition of music on a professional basis and so certified."

Appendix L

Commercial artists, such as illustrators or photographers, were not included, the theory being that they are better able to afford studios in other areas.

The department decided to issue the regulations in an effort to discourage nonartists from illegally moving into the area — and to comply with a ruling in State Supreme Court that ordered the agency to write regulations. The ruling came in a case involving the department's refusal to certify a photographer. The court held that the case was impossible to review in the absence of written certification rules.

The certification procedure calls for artists to provide samples of their work, a resume of their training and exhibitions and professional references.

A major change in the proposed regulations would eliminate the requirement for artists to apply for certification every three years. Instead, artists would be given lifetime certification, which would be updated only when an artist moved from one loft to another. Newcomers must register under the new regulations when they take effect. It has not yet been determined whether the existing three-year certifications will be automatically extended to lifetime certification.

The new certification rules become effective in August after a comment period. They are not intended to be used as a tool to evict nonartists from SoHo or NoHo, but to discourage more nonartists from moving to the area, according to the department.

The city's Planning Commission is currently considering ways to resolve the status of nonartist residents. LAST Wednesday the City Council's Committee on Housing

and Buildings held a hearing on Councilwoman Miriam Friedlander's resolution that the Planning Commission "waive the artist-certification requirement for residents who lived in the area prior to April 1, 1981, or who are otherwise eligible for coverage under the loft law." The loft law, for example, grandfathers the residential status of some nonartists who have lived in the area since 1976.

The Democratic Councilwoman, whose district is lower Manhattan, has also introduced a resolution urging the relevant city agencies to give tenants living in illegal lofts — the commercial buildings used for residences — another chance to register them and be protected from eviction under zoning resolutions. As it stands now, about 200 illegal lofts were not registered before the 1983 deadline and the tenants are subject to eviction, according to the Loft Zoning Coalition, a tenant group. The Loft Board, meanwhile, continues to develop a large backlog of landlord-tenant cases because it was not been able to hold regular meetings for several months this year as a result of vancancies on the board and delays caused by an ethics ruling, according to William Bernstein, executive director of the board.

In April, Jorge Batista, the former board chairman and president of the South Bronx Development Organization, resigned as a result of the city's Board of Ethics ruling that board members are city officials and that their outside business activities were restricted by city laws. Mayor Koch then appointed George Dole as chairman.

APPENDIX M — STANDARD FORM OF LOFT LEASE

STANDARD FORM OF LOFT LEASE
The Real Estate Board of New York, Inc.

Agreement of Lease made as of this 27th day of May 1982, between 640 BROADWAY RENAISSANCE CO. party of the first part, hereinafter referred to as LANDLORD, and PHOEBE RENTSCHLER and TEMPLE SMITH party of the second part, hereinafter referred to as TENANT

Witnesseth: Landlord hereby leases to Tenant and Tenant hereby hires from Landlord Loft Unit 9E in the building known as 640 Broadway in the Borough of Manhattan, City of New York, for the term of TWO (2) YEARS (or until such term shall sooner cease and expire as hereinafter provided) to commence on FIRST day of June nineteen hundred and Eighty-Two, and to end on THIRTY-FIRST day of May nineteen hundred and Eighty-Four both dates inclusive, at an annual rate of TWELVE THOUSAND DOLLARS ($12,000.00), payable in equal monthly installments of $1,000.00 on the first of each and every month without demand,

* * *

The parties hereto, for themselves, their heirs, distributees, executors, administrators, legal representatives, successors and assigns, hereby covenant as follows:

Rent

1. Tenant shall pay the rent as above and as hereinafter provided.

Appendix M

Occupancy

2. Tenant shall use and occupy premises for PHOTOGRAPHY STUDIO and for no other purpose.

Alterations:

3. Tenant shall make no changes in or to the demised premises of any nature without Landlord's prior written consent. Subject to the prior written consent of Landlord, and to the provisions of this article, Tenant at Tenant's expense may make alterations, installations, additions or improvements which are non-structural and which do not affect utility services or plumbing and electrical lines, in or to the interior of the demised premises by using contractors or mechanics first approved by the Landlord.

* * *

Repairs:

4. Tenant shall, throughout the term of the lease, take good care of the demised premises and the fixtures and appurtenances therein and at Tenant's sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements fire or other casualty, excepted. Notwithstanding the foregoing, all damages or injury to the demised premises or to any other part of the business, or to its fixtures equipment and appurtenances, whether requiring structural or non-structural repairs, caused by or resulting from carelessness, omission, neglect or improper conduct of Tenant, Tenant's servants, employees, invitees or licensees, shall be repaired promptly by Tenant at its

sole cost and expense, to the satisfaction of Landlord reasonably exercised.

* * *

Requirements of Law, Fire Insurance, Floor Loads:

6. Prior to the commencement of the lease term, if Tenant is then in possession, and at all times thereafter, Tenant at Tenant's sole cost and expense, shall promptly comply with all present and future laws, orders and regulations of all state, federal, municipal and local governments, departments, commissions and boards and any direction of any public officer pursuant to law and all orders, rules and regulations of the New York Board of Fire Underwriters or any similar body which shall impose any violation, order or duty upon Landlord or Tenant with respect to the demised premises whether or not arising out of Tenant's use or manner of use thereof, or with respect to the building if arising out of Tenant's use or manner of use of the premises or the building (including the use permitted under the lease). Except as provided in Article 29 hereof, nothing herein shall require Tenant to make structural repairs or alterations unless Tenant has by its manner of use of the demised premises or method of operation therein, violated any such laws, ordinances, orders, rules, regulations or requirements with respect thereto.

* * *

Occupancy:

15. Tenant will not at any time use or occupy the demised premises in violation of the certificate of occupancy issued for the building of which the demised premises are a part. Tenant has inspected the premises and accepted them as

is, subject to the riders annexed hereto with respect to Landlord's work, if any. In any event, Landlord makes no representation as to the condition of the premises and Tenant agrees to accept the same subject to violations whether or not of record.

* * *

Sprinklers:

29. Anything elsewhere in this lease to the contrary notwithstanding, if the New York Board of Fire Underwriters or the New York Fire Insurance Exchange or any bureau, department or official of the state or city government require or recommend the installation of a sprinkler system or that any change, modifications, alterations, or additional sprinkler heads or other equipment be made or supplied in an existing sprinkler system by reason of Tenant's business or the location of partitions, trade fixtures, or other contents of the demised premises, or for any other reason, or if any such sprinkler system installations, changes, modifications, alterations, additional sprinkler heads or other such equipment, become necessary to prevent the imposition of a penalty or charge against the full allowance for a sprinkler system in the fire insurance rate set by any said Exchange or by any fire insurance company, Tenant shall, at Tenant's expense promptly make such sprinkler system installations, changes, modifications, alterations, and supply additional sprinkler heads or other equipment as required whether the work involved shall be structural or non-structural in nature.

* * *

Appendix M

Glass:

36. Tenant shall replace, at the expense of Tenant, any and all plate and other glass damaged or broken . . . w

* * *

SEE RIDERS ANNEXED HERETO AND MADE PART HEREOF.

In Witness Whereof, Landlord and Tenant have respectively signed and sealed this lease as of the day and year first above written.

640 BROADWAY RENAISSANCE CO.

Witness for Landlord: By:.....

..... /s/.....
PHOEBE RENTSCHLER

Witness for Tenant: /s/.....
TEMPLE SMITH

..... /s/.....

* * *

ADDITIONAL CLAUSES attached to and forming a part of Lease dated May 27, 1982 between 640 BROADWAY RENAISSANCE CO. as Landlord and PHOEBE RENTSCHLER and TEMPLE SMITH as Tenant.

39. *PERMITS:* Tenant covenants that Tenant will not

use or suffer or permit any person to use the demised premises for any unlawful purpose and to obtain and maintain at Tenant's sole cost and expense all licenses and permits from any and all governmental authorities having jurisdiction of the demised premises which may be necessary for the conduct of Tenant's business therein. Tenant further covenants to comply with applicable laws, resolutions, codes, rules and regulations of any department, bureau, agency or any governmental authority having jurisdiction over the operation, occupancy, maintenance and use of the demised premises for the purposes set forth herein. Tenant will indemnify and save Landlord harmless from and against any claims, penalties, loss, damage or expense imposed by reason of a violation of any applicable law or the rules and regulations of governmental authorities having jurisdiction thereof related to Tenant's use and occupancy.

40. *INDEMNITY:* Tenant agrees to indemnify and save harmless landlord against and from any and all claims by or on behalf of any person or persons, firm or firms, corporation or corporations, arising from any work or thing whatsoever done by or on behalf of Tenant, in or about the demised premises, and will further indemnify and save Landlord harmless against and from any and all claims arising from any breach or default on the part of Tenant in the performance of any covenant or agreement on the part of tenant to be performed, pursuant to the terms of this lease, or arising from any act or negligence of Tenant, or any of its agents, contractors, servants, employees or licensees, and from and against all costs, reasonable counsel fees, expenses and liabilities incurred in or about any such claims or action or proceeding brought thereon; and in case any action or proceeding be brought against Landlord by reason of any such

claim, Tenant, upon notice from Landlord, covenants to resist or defend, at Tenant's expense, such action or proceeding by counsel reasonably satisfactory to Landlord.

* * *

54. COST OF LIVING ADJUSTMENT: Recognizing the length of the term of the lease granted Tenant and inflationary tendencies in recent years, Tenant agrees that in the event the "Consumer Price Index" published by the Bureau of Labor Statistics of the U.S. Department of Labor (1967 = 100) for New York/Northeastern New Jersey area fir :All items" (hereinafter called the "Price Index"), or successor or substitute index appropriately adjusted, reflects an increase after the commencement date of this lease in the cost of living, over and above such costs as reflected by such Price Index as it exists for the month of May 1982 (hereinafter called the "Base Month") the fixed rent payable hereunder shall be increased in accordance with the following:

(a) There shall be no adjustment until the month of June 1983 On the first day of June 1983 and each June 1 thereafter through the term, there shall be an adjustment in the amount of said fixed rent based on the difference between the Price Index as it exists on the Base Month and the Price Index for the calendar month of the date of such adjustment.

(b) The percentage increase thus determined shall be multiplied by annual fixed rent payable hereunder and this sum shall represent the annual increase in such rent for the twelve (12) months next ensuing, commencing with such June adjustment month, provided that no such adjustment shall result in a decrease in the fixed rent below the fixed rent payable by Tenant under the terms of this lease.

Appendix M

* * *

55. *Maintenance.* Tenant shall maintain the premises in a proper manner and in a general state of cleanliness. Tenant shall, at Tenant's sole cost and expense, arrange for the removal of and shall cause to be removed all refuse and rubbish from the demised premises in a manner which shall at all times comply with (a) such rules and regulations as, in the judgment of the Landlord, are necessary or desirable for the proper operation of the Building and (b) all applicable laws, orders, ordinances, rules and regulations of the Sanitation Department and Board of Health of New York City and of any other governmental authority having jurisdiction over the demised premises or the operations conducted therein.

56. *No Representations.* Tenant acknowledges that Tenant is fully familiar with the condition of the Building and the demised premises. Tenant therefore agrees to accept the demised premises "as is" and in whatever state or condition they may be in at the commencement of the term of this lease. Landlord shall not be obligated to do any work or may any repairs, alterations, or improvements in or to the demised premises, except as specifically set forth in this lease.

* * *

58. *Certificate of Occupancy:* Tenant acknowledges that the certificate of occupancy, if any, for the building does not permit residential occupancy of the premises.

* * *

62. Tenant shall supply and install all fixtures desired by Tenant at Tenant's own cost and expense. Tenant also

recognizes and agrees that the Tenant must obtain the written consent of the landlord for all alteration work to be done on the premises *in advance* for all such work being done. Tenant further recognizes and agrees that because this is a fireproof building, that all partition work must be done with metal studs and with 5/8" sheet rock on both sides. Tenant further recognizes, understands and covenants that the use of any wooden studs or partitions in the premises will be both a violation of the lease and a violation of the applicable building laws and codes and tenant covenants and agrees not to use any non-fireproof materials in any such construction work.

63. Tenant also recognizes and understands that all plumbing work must be done or approved by a licensed plumber and will submit all plumbing plans to the landlord for landlord's prior written approval before such work is commenced.

64. Tenant recognizes, agrees and covenants that all waste and vent lines must be made of properly sized cast iron or galvanized iron pipe and that the use of plastic pipe is not legal in New York City. Tenant further recognizes and agrees that if copper tubing is used, said copper tubing must be *rigid* copper tubing and that the use of flexible copper tubing is not lawful or permitted and will also be a violation of the lease.

65. Tenant recognizes, agrees and covenants that all electrical work must be done and filed by a New York City licensed electrician. Tenant shall supply copies of all electrical installation drawings to the Landlord prior to such installation.

66. Tenant shall require all its contractors, plumbers and electricians to supply to the Landlord a certificate of insurance naming the Landlord as an additional insured prior to the commencement of any work by said contractor, plumber or electrician.

Appendix M

* * *

69. Tenant warrants and represents that Tenant has fully inspected premises and, in particular, the present gas and electric services in the premises; Tenant accepts the premises and the existing gas and electric services as is and represents and warrants to the landlord that all necessary work to the electric and gas systems in the loft premises, if any, shall be done by Tenant, at Tenant's sole cost and expense, and in compliance with all applicable New York City codes, laws and regulations. All necessary installation of any meters for gas or electric service, or additional gas or electric lines, if any, will be at Tenant's sole cost and expense.

* * *

72. Tenants agree to accept the demise premises "as-is" in its condition as of the date hereof.

Please Initial:

Landlord _____

Tenant _____

* * *

GUARANTY

The undersigned Guarantor guarantees to Landlord, Landlord's successors and assigns, the full performance and observance of all the agreements to be performed and observed by Tenant in the attached Lease, including the "Rules and Regulations" as therein provided, without requiring any notice to Guarantor of nonpayment or, nonperformance, or proof, or notice of demand, to hold the undersigned responsible under

this guaranty, all of which the undersigned hereby expressly waives and expressly agrees that the legality of this agreement and the agreements of the Guarantor under this agreement shall not be ended, or changed by reason of the claims by Landlord against Tenant of any of the rights or remedies given to Landlord as agreed in the attached Lease. The Guarantor further agrees that this guaranty shall remain and continue in full force and effect as to any renewal, change or extension of the Lease. As a further inducement to Landlord to make the lease, Landlord and Guarantor agree that in any action or proceeding brought by either Landlord or the Guarantor against the other on any matters concerning the Lease or of this guaranty that Landlord and the undersigned shall and do waive trial by jury.

Dated, New York City 5/27 1982

WITNESS:

s/s.....Guarantor
Phoebe Retschler

/s/_____
Temple Smith

APPENDIX N — CERTIFICATION OF THE CLERK OF THE UNITED STATES BANKRUPTCY COURT

UNITED STATES BANKRUPTCY COURT

Southern District of New York

In re

640 BROADWAY RENAISSANCE COMPANY

Case No. 90B10574 TLB

Debtor(s)*
Social Security No.:
Employer Tax ID No.:

CERTIFICATE OF COMMENCEMENT OF CASE

I certify that on 2/22/90

XX the above named debtor filed a petition requesting relief under chapter 11 of the Bankruptcy Code (title 11 of the United States Code), or

__ a petition was filed against the above named debtor under chapter __ of the Bankruptcy Code (title 11 of the United States Code), and

__ that as of the date below the case has not been dismissed.

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* Set forth all names, including trade names, used by the debtor within the last 6 years. (Bankruptcy Rule 1005). For joint debtors set forth both social security numbers.

Appendix N

CECELIA M. LEWIS
Clerk of Court

By: /s/_____
Deputy Clerk

FEB 22 1990
Date

APPENDIX O — CERTIFICATE OF OCCUPANCY

DEPARTMENT OF BUILDINGS

BOROUGH OF MANHATTAN, THE CITY OF NEW YORK

Date May 17, 1966 No. 63115

CERTIFICATE OF OCCUPANCY

NO CHANGES OF USE OR OCCUPANCY NOT CONSISTENT WITH THIS CERTIFICATE SHALL BE MADE UNLESS FIRST APPROVED BY THE BOROUGH SUPERINTENDENT

This certificate supersedes C. O. No. 30409

THIS CERTIFIES that the altered building premises located at 640 Broadway; 64-66 Bleecker St.; 174 Crosby St. Block 522 Lot 14

That the zoning lot and premises above referred to are situated, bounded and described as follows:

BEGINNING at a point on the east side of Broadway distant 0'-0" feet south from the corner formed by the intersection of Broadway and Bleecker Street running thence east 196'-4" feet; thence south 27'-3" feet; thence west 196'-4"; thence north 25'-3" feet; to the point or place of beginning, conforms substantially to the approved plans and specifications, and to the requirements of the Building Code, the Zoning Resolution and all other laws and ordinances, and of the rules of the Board of Standards and Appeals, applicable to a building of its class and kind at the time the permit was issued; and

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CERTIFIES FURTHER that, any provisions of Section 646F of the New York Charter have been complied with as certified by a report of the Fire Commissioner to the Borough Superintendent. Class 1. Alt. No. 2134-1965. Construction classification - Fireproof. Occupancy classification - Commercial Building. Height 9 stories, 122 feet. Date of completion - April 29, 1966. Located in M 1-5 Zoning District at time of issuance of permit.

This certificate is issued subject to the limitations hereinafter specified and to the following resolutions of the Board of Standards and Appeals: and The City Planning Commission.

PERMISSIBLE USE AND OCCUPANCY

Off-Street Parking Spaces _____

Off-Street Loading Berths _____

STORY	LIVE LOADS Lbs. per Sq. Ft.	PERSONS ACCOM-MODATED	USE
Sub-cellar			Boiler and vacant.
Cellar	150	2	Electric shop and storage.
1st Story	150	25	Stores and barber.
2nd Story	150	10	Manufacturing and cutting.
3rd Story	150	20	Offices.
4th Story	150	8	Manufacturing and cutting.

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5th Story	150	15	Offices.
6th Story	150	25	Manufacturing.
7th Story	150	40	Manufacturing and cutting.
8th Story	150	8	Manufacturing and cutting.
9th Story	150	5	Manufacturing and cutting.
		NOTE:	All manufacturing is in use group 17.
			FIRE DEPARTMENT APPROVALS: Standpipe System-April 25, 1944. Interior Fire Alarm System - April 25, 1944. Thermostatic Fire Heat System - March 11, 1966.

OFFICE COPY - DEPARTMENT OF BUILDINGS

/s/_____
Borough Superintendent

APPENDIX P — LOFT BOARD ORDER

NEW YORK CITY
LOFT BOARD

----------x Loft Board Order

In the Matter of the	:	# 759
Applications of Joel D.	:	MC # 0429
Hinman and Marilyn Manos	:	Re: 640 Broadway New York, New York
----------x		Docket #'s TR-0092, TR-0365

The case concerns two applications filed by the tenants of 640 Broadway, New York, New York. In application No. TR-0092, filed on August 6, 1983, Mr. Joel D. Hinman and some 23 other tenants signed a coverage application form. In application No. TR-0365, Marilyn Manos, a subtenant of the western half of unit 8E, filed an application alleging that she was the residential occupant entitled to protection. These applications were later supplemented by a letter dated February 26, 1985, contending that the following units and residential occupants were covered by Article 7-C:

2E	-	John Eisner
2W	-	Robert Rossiter
2WB	-	Loren Calaway
3E	-	Richard Yoder
3W	-	Charles Searles
4E	-	Rafael Barrios, Carlos Sosa, and Judy Levy
4WF	-	Guillermo Gleizer
4WR	-	Juliet Holland
5E	-	Joel Hinman

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5W	-	Andrea Vignoli
6E	-	Hannah Eshel
6W	-	Kenneth De Lap
6WR	-	Lisa Krall
7E	-	Nancy Hoffman Giesman
7W	-	Ruth Holloman
7C	-	Kim Steele
8E	-	Rina Peleg and Marilyn Manos
8W	-	Donna Goodman
8C	-	Peter Neptune
9E	-	Temple Smith and Phoebe Rentschler
9W	-	Marie-Paule Fauque

The premises are in a section of the city known as NoHo, in an area zoned as Ml-SB. This nine-story building itself was erected around 1965 and occupies approximately 5000 square feet. The Certificate of Occupancy ("C of O"), issued on May 17, 1966, permits commercial use of the cellar and first floors, office use of the third and fifth floors, and manufacturing use of the second, fourth, sixth, seventh, eighth, and ninth floors. Under the Zoning Resolution, residential use in a building of this size located on Broadway is permitted only for joint living-work quarters for artists by a way of a special permit. Zoning Resolution Section 42-14B(l)(b). The special permit requirements are significantly simplified where the city Planning Commission determines that floor area in the building was occupied as dwelling units or joint living-work quarters for artists on September 1, 1980. Zoning Resolution Section 74-782. As of January 8, 1987, the definition of "joint living-work quarters for artists" was expanded to include units occupied by nonartists who file with the Department of Cultural Affairs by October 8, 1987. Zoning

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Resolution Section 12-10 (amended effective January 8, 1987).*

PROCEEDINGS BEFORE THE BOARD

This case was initially conferenced on December 12, 1983, with some 16 tenants, their attorney Deirdre Carson, Esq., and the owner's attorney, Margaret Baisley, Esq., present. Soon afterwards, Gulliermo Gleizer, one of the tenants not present at the conference, filed a separate application with the Board and an Article 78 petition in the New York Supreme Court seeking to nullify the entire proceedings due to the failure to name him as an affected party in the application. His application before the Board was denied, Loft Board Order No. 0102, and the Article 78 proceeding dismissed. *Gleizer v. New York City Loft Board*, Order at 3 (New York Co. Supreme Court, June 16, 1984). On reconsideration, the Board further held that any potential prejudice to Mr. Gleizer was remedied by allowing him to file an answer to the original application. Loft Board Order No. (August 1, 1984). The history of the proceeding involving Mr. Gleizer is described in greater detail in that order.

The case was conferenced a second time before a new hearing officer on January 25, 1985. This conference was attended by 20 tenants (including Mr. Gleizer), Ms. Carson, and Richard A. Givens, Esq., the owner's new attorney. After this conference, the owner filed an answer on March 2, 1985, alleging, *inter alia*, that the applicants must show primary residential use of each window period occupant, that zoning

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* According to the City Planning Commission, residency applications and/or nonartist filings are presently pending for all the units in the coverage application.

restrictions precluded coverage, that coverage would constitute an unconstitutional impairment of contracts and a taking of property without due process, that no public emergency existed to bring Article 7-C into operation, that a hardship claim be entertained without a formal application being required, and that the Loft Board is not an impartial tribunal.

THE HEARINGS

The hearings in this case were held between March 25, 1985, and September 16, 1986, for a total of 25 days. The tenants called 27 witnesses and submitted over 250 exhibits. The owner produced no witnesses, but relied instead on several post-hearing submissions to press its legal and constitutional objections to coverage. In addition to presenting evidence upon the issue of whether individual units were residentially occupied during the window period, the tenants adduced additional testimony going to the owner's attempts to seek a zoning variance from the Department of Buildings in 1978 and a special permit from the Department of City Planning to permit residential conversion of the premises in 1982. This evidence, which the tenants' attorney represented as admissions on the part of the owner that the building was residentially occupied at least since 1978, will be discussed first.

Owner's Attempts to Convert Building to Legal Residential Use

The records of the Department of Buildings indicate that in May 1977 and November 1978 violations were issued against the owners of 640 Broadway for illegal use of the building for residential purposes. The evidence relating to the owner's subsequent attempts to obtain permission for

residential conversion of the premises consisted principally of the testimony of *Joseph Lombardi*, the owner's architect. Mr. Lombardi testified that he was retained by Martin Fine (an employee of the owner 640 Broadway Renaissance Co., who purchased the building in 1978) in early 1978 to file an alteration application with the Department of Buildings to permit residential conversion of floors two through nine of 640 Broadway. After the alteration application was filed in the spring of 1978, Mr. Lombardi filed an application for a zoning variance with the Board of Standards and Appeals on April 21, 1980, to permit the residential conversion. In support of this application, Mr. Lombardi and the owner submitted a tenant history listing the tenants in occupancy since 1978* and describing their use as "artist's studio," a permissible use under the zoning law. At the same time, Lombardi submitted several letters from real estate brokers who stated that they were unable, despite extensive advertising, to find any conforming-use tenants for the premises.

After the Zoning Resolution was amended in 1981, Mr. Lombardi withdrew the variance application and, around June 1982, filed a new special permit application with City Planning pursuant to Zoning Resolution Section 74-782.** Mr. Lombardi's attached statement remarked,

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* The tenants listed were Rossiter (2W), Goda and Moriya (2E), Eisner (2E), Searles (3W), Yoder (3E), Barr & Winfield (4W), Gleizer (4W), Carlos Sosa (4E), Hinman & Murphy (5W), Vignoli & Gragnani (5E), Krall & Palazzollo (6W), Holloman (7W), Kida (7E), Rudman (7E), Giesmann (7E), Rexach (8W), Goodman (8W), Ohana (8E), Fauque & Bertoglio (9W), and DiGiovanni (9E).

** According to the City Planning Commission, the owner sought to withdraw this special permit application in July 1985.

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> For three and one half (3 1/2) years after [the winter of 1976] an extensive and costly campaign was waged in an attempt to find conforming-use tenants. *This campaign resulted in a complete failure.* [Emphasis added.]

Soon afterwards, Mr. Lombardi solicited documentation from the tenants to establish their residential occupancy as of September 1, 1980, and supplied these documents in an application dated June 21, 1983, indicating that the first floor was a "residential lobby" and that the second through ninth floors were occupied as "dwelling units/joint living-work quarters for artists."*

Doris Diether, a member of Manhattan Community Board No. 2, testified concerning the zoning variance. She stated that, in May 1980, the owner's application for a variance came before the community board. During the hearings, some of the tenants appeared and indicated they were already living in the building. Twelve tenants** also signed a collective statement stating they were residing in the building. *See* Exhibit 23.

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* The special permit application indicated occupancy by Tanabe (2E), Rossiter (2W), Calaway (2WB), Yoder (3E), Searles (3W), Sosa (4E), Gleizer (4W), Vignoli (5E), Hinman & Murphy (5W), Palazzolo (6W), Krall (6W), Eshel (6E), Hoffman (7E), Holloman & Steele (7W), Peleg (8E), Goodman (8W), and Fauque (9W).

** The twelve tenants signing the statement were Beth Zaboth (2E), Charles Searles (3W), Charles Gifford (4W), Joel Hinman (5W), Philip Murphy (5W), Hannah Eshel (6E), Rachel Rudman (7E), Kim Steele (7W), Ruth Holloman (7W), Debra Winters (9E), Marie-Paule Fauque (9W), and Edo Bertoglio (9W).

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On June 19, 1980, the community board adopted a resolution recommending that the zoning variance application be denied. As part of the resolution, the board stated:

> This building was illegally occupied even when the owner purchased it, and the owner was aware of this fact yet did nothing about it, thus encouraging other tenants to move in, and discouraging conforming uses.

See Exhibit 20.

Following this, several hearings were held before the Board of Standards and Appeals. During these hearings, Mr. Lombardi submitted new floor plans to BSA, which allegedly more accurately reflected the existing unit layouts. After this submission and prior to a February 19, 1981, BSA hearing, Ms. Diether, along with Mr. Lombardi, conducted an inspection of all the units in the building to which she was able to gain access, making notations as she went. Notations on a copy of the Lombardi floor plans are made for units 2W, 2WB, 3E, 4R, 4WB, 4E, 5W, 5E, 6W, 6WB, 6E, 7W, 7WB, 8W, and 8E. Commenting generally upon her findings in a zoning committee report, dated February 19, 1981, Ms. Diether stated:

> The conditions I encountered on the inspection were very upsetting. The tenants or at least many of them have spent considerable sums to renovate spaces in the building. Loft beds have been installed, complete kitchens and baths, fancy floors, partitions, a lot of built-in cabinets, etc. However, a good portion of the work would never pass an inspection by the Department of Buildings ... It appears to me that, in order to assure that all the units will be legal, the building should be done over almost

completely, even though this will be a real hardship on the tenants.

Ms. Diether testified that in September 1981, BSA asked that the 640 Broadway variance application, along with similarly situated buildings, be withdrawn and referred to the City Planning Commission for a special permit pursuant to Zoning Resolution Section 74-782.

* * *

POST-HEARING MEMORANDA

Subsequent to the last hearing date of September 16, 1985, several memoranda of law were filed by Richard Givens, Esq., on behalf of the owner; by Deirdre Carson, Esq, on behalf of all tenants except Guillermo Gleizer; and by Guillermo Gleizer, *pro se*.

Mr. Givens filed his "First Written Offer of Proof" on November 6, 1985. By this memorandum, the owner sought to adduce evidence on (1) the lack of a public emergency requiring implementation of Article 7-C; (2) Article 7-C's undue burden on interstate commerce; (3) the inadequacy of artist certification as a basis for compulsory residential conversion; (4) the financial hardship of compliance with Article 7-C on the owner; and (5) the impropriety of the Loft Board as an adjudicative body. The owner also raised the following defenses to coverage: (1) that the failure of some tenants to file New York City income taxes or to list 640 Broadway as their residence on their federal income taxes requires denial of coverage; (2) that the tenants are estopped from seeking coverage by their signing leases prohibiting residential use; (3) that coverage would impose involuntary

servitude upon the owner; (4) that to require a special permit to be sought would violate due process; (5) that a compulsory zoning change would violate due process and be unconstitutional as applied; and (6) that coverage would deny the owner equal protection by treating it worse than owners who were granted special permits or than public utilities which are permitted a 14% return on investment.

On November 13, 1985, the hearing officer indicated that she would recommend denial of the owner's first offer in its entirety. She concluded (1) that the Board lacked jurisdiction to consider the constitutional issues; (2) that evidence on a public emergency and on the legality of the artist certification requirement was not relevant to coverage; (3) that the owner's failure to timely file a hardship application as required by the Board's regulations precluded consideration of any hardship claims; and (4) that the Board lacked jurisdiction to adjudicate the equitable defense of estoppel.

The owner filed a "Second Written Offer" a few months later, on January 27, 1986. This memorandum requested findings as to whether certain facts, nearly all of which had occurred on the record during the hearings, had actually taken place. On February 14, 1986, the hearing officer also denied the owner's second offer in its entirety on the grounds that such preliminary findings were improper. The owner's "Third Written Offer of Proof" was filed on May 5, 1986, contending that transcription of the hearings would cost $15,000 and require three months to prepare and that therefore the second offer should be accepted. The hearing officer denied the third offer on May 9, 1986.

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Guillermo Gleizer filed three *pro se* post-hearing memoranda. The first, filed on May 6, 1986, contended that (1) he was the prime lessee of unit 4W and 4WR, (2) 4WR was unoccupied until May 1, 1980, and Mr. Gleizer occupied 4WR as a warehouse and projected photography studio until June 1, 1980; (3) Charles Gifford occupied 4WR as an architectural studio; (4) Juliet Holland was not the residential occupant of 4WR because she filed her taxes with a Connecticut address and had her bank, stockbroker, accountant, and doctor in Connecticut; (5) Mr. Gleizer has the right to reclaim 4WR under Subletting Regulations Section B.4; (6) Article 7-C is an unconstitutional impairment of the obligation of contracts; and (7) the Board's subletting regulations are a nullity, having been promulgated without authority.

Mr. Gleizer filed a second brief on May 5, 1987, containing similar contentions: (1) that Mr. Gifford did not residentially occupy unit 4WR; (2) that Ms. Holland was not the residential occupant qualified for protection because she offered inadequate proofs of residential occupancy; (3) that Ms. Holland's residential occupancy was precluded by her sublease; and (4) that Mr. Gleizer's pending holdover action against Ms. Holland, filed on September 1, 1984, permitted him to reclaim 4WR under Subletting Regulation Section B.4. In this brief, Mr. Gleizer also contended, apparently for the first time, that 4WR was a covered IMD unit, having been residentially occupied by Mr. Gleizer from March 1980 to mid-1982. Mr. Gleizer enclosed with this brief his 1980-1981 Con Edison bills, his 1980-1981 telephone bills, his driver's license (expiring in 1984), and a 1984 insurance card.

In July 1987, Ms. Susan Kornhauser, the hearing

officer who presided over the hearings, left the employ of the Loft Board and the case was reassigned to hearing officer John Spooner.

On November 20, 1987, the tenants' attorney, Deirdre Carson, Esq., filed her voluminous brief, consisting of 171 pages of text and 50 additional pages of indices of the hearing tapes and exhibits. This brief contended that all of the units upon which evidence was offered, with the exception of 4WF occupied by Mr. Gleizer, were covered IMD units. In addition, the tenants contended that (1) any units first residentially occupied before April 1, 1981, were accreted units under Coverage Regulations Section I(6)(1)(c); (2) the owner's application for a zoning variance constituted an admission of residential occupancy; (3) coverage may be granted contingent upon ultimate approval of a special permit by City Planning; (4) the Board should find that all of the floor area of the building, from the second through the ninth floors, was residentially occupied on September 1, 1980; (5) implementation of the 1987 amendment to Article 7-C (M.D.L. Section 281(4)) requires a finding of residential occupancy as of September 1, 1980, for units 9E, 2E, 8W, and 7E; (6) the present occupants of the units should be found to be protected under Article 7-C; (7) the question of whether certain units meet the minimum size requirements of the zoning resolution does not preclude coverage but is a matter to be resolved in legalization; and (8) the 1987 amendments to the joint living-work quarters for artists regulations renders moot the owner's objections as to the artist certification process.

The owner responded to the tenants' contentions on December 23, 1987. In its memorandum, the owner contended that the tenants had failed to establish residential occupancy of

the premises because (1) their testimony of residential use contradicted the terms of their leases, which created a presumption of commercial use; (2) the tenants of units 4E, 4WR, 5E, 8E, and 9W had failed to file New York City income tax returns; and (3) the utility bills are hearsay and inadequate indicia of residential use. The owner further contended that (1) undersized units cannot be covered; (2) zoning and statutory amendments cannot be applied retroactively; and (3) the new hearing officer to whom the case was reassigned was unable to observe the witnesses' demeanor and therefore unqualified to recommend findings on the case. Finally, the owner requested a copy of any report submitted by the hearing officer to the Loft Board.

On January 7, 1988, Mr. Gleizer filed his third brief in response to that filed by the owner. In this brief, Mr. Gleizer argued that (1) he has not physically left the premises as the owner alleges; (2) the owner's $1.5 million lawsuit against the 640 Broadway tenants for falsely representing they planned to use their units commercially is inconsistent with their present allegations of non-residential use; (3) Mr. Gleizer is a residential occupant qualified for protection; (4) if 4WR is an IMD unit, Mr. Gleizer is also the protected occupant; (5) Mr. Gleizer received inadequate notice of the hearings and was deprived of an opportunity to cross-examine most of the other tenants.

OPINION:

This case, by its sheer size alone, has been one of the most burdensome the Loft Board has been called upon to adjudicate. The number of allegedly residential units, the imposing array of witnesses, and the daunting volume of

documents will preserve the case in the annals (as well as the file cabinets) of the Board for years to come. Indeed, the original coverage application, filed soon after the creation of the Loft Board, has been with the Board longer than most of the present members or staff. And yet, despite what the owner's vigorous opposition papers would suggest, the issues in the case itself are surprisingly straightforward, both factually and legally.

Perhaps the most complicated issue raised by this case, once the stacks of documents and weeks of testimony have been sorted through, is the status of the alleged residential occupancy under the Zoning Resolution. Article 7-C can cover only those buildings in which the Zoning Resolution permits "residential use as of right." M.D.L. Section 281(2). In a building of this size located on Broadway, the Zoning Resolution permits residential use only under a special permit granted for joint living-work quarters for artists, Zoning Resolution Section 42-14B((1)(b), with the requirements being significantly simplified where the City Planning Commission determines that floor area in the building was occupied as dwelling units or joint living-work quarters for artists on September 1, 1980. Zoning Resolution Section 74-782. In addition, to satisfy the "artist" requirement, occupants must either be certified as artists by the Department of Cultural Affairs or have filed an application with Cultural Affairs by October 8, 1987, alleging residency as of September 15, 1986. Zoning Resolution Section 12-10 (amended effective January 8, 1987).

According to the City Planning Commission files, a special permit and artist/non-artist certifications were timely filed and remain pending for all of the units included in this

coverage proceeding.* Although the owner insists that the absence of a granted special permit automatically precludes coverage, this is inaccurate. Under M.D.L. Section 281(2)(iv), "interim multiple dwellings" include "buildings, structures, or portions thereof which may be converted to residential use pursuant to a special permit granted by a local planning agency." Moreover, the Board regulations include as IMD units those units "in which the residential use may become a use as of right as a result of approval of a grandfathering application, in accordance with Section 281(i) or (iv)." Coverage Regulations Section I(b)(1)(a). Artist certification, too, is excluded as a requirement for coverage, and can lead to an exemption only where the current occupant lacks the necessary certification "at the time of issuance of the final certificate of occupancy." Coverage Regulations Section I(E)(3).

Thus, as past Board decisions have made clear, the Board may adjudicate coverage as long as residential use as-of-right may be granted under the special permit process of Zoning Resolution Section 74-782, whether or not the residential use has presently been approved or not. *See In the Matter of the Application of Vita Holdings Ltd.*, Loft Board Order No. 176 (March 6, 1985); *In the Matter of the Application of 475 Broadway*, Loft Board Order No. 169 (February 6, 1985) (premises covered with continued coverage dependent the granting of a special permit by City Planning); *In*

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* Applicants' attorney has requested that the Board make a special certification of residential occupancy as of September 1, 1980, for the benefit of the City Planning Commission's consideration of the pending special permit. This the Board declines to do, since it would appear to usurp the fact-finding authority of that agency and is unnecessary to a determination of coverage.

the Matter of the Application of 473 Broadway, Loft Board Order No. 171 (February 6, 1985) (same); *In the Matter of the Application of Max Landau*, Loft Board Order No. 108 (August 1, 1984) (same); *In the Matter of the Application of Morrie Golick*, Loft Board Order No. 72 (March 21, 1984). *See also Missry v. New York City Loft Board*, December 16, 1987, NYLJ, p. 12, col 6., p. 12, col 1 (New York Supreme Court). (Loft Board may require owner to procure City Planning ruling on residential use prior to seeking decoverage.) The pending special permit and artist/non-artist certification are thus sufficient to permit coverage of all of the affected units, with continued coverage dependent upon the subsequent granting of a special permit and the necessary certifications.

The minimum floor coverage issue raised by the owner also does not prohibit coverage under Article 7-C. It is true that M.D.L. Section 277(7)(a)(i) requires that joint living-work quarters for artists contain 1200 square feet of interior space, while Zoning Resolution Section 15-026 (enacted September 25, 1986) permits joint living-work quarters for artists to contain 415 or 600 square feet if certain requirements are met. However, as the Board has held in past decisions, the issue of a unit's size is a question to be addressed in legalization and does not preclude coverage under Article 7-C. *In the Matter of the Application of William Barvin*, Loft Board Order No. 642 (September 11, 1987). Thus, even assuming some of the units are less than the required minimum size, this fact would not affect the coverage question at issue here.

The owner also argues that none of the Zoning Resolution provisions can be applied "retroactively" so as to permit coverage. There is clearly no retroactivity issue as to minimum size, since that is irrelevant to coverage no matter

what version of the resolutions is used. There is likewise no retroactivity issue as to the artist/non-artist certifications, as amended by Zoning Resolution Section 12-10 (January 8, 1987). As already discussed, the Board's own regulations, as well as prior decisions, make clear that the absence of certification does not prevent coverage, even though a lack of certification may result in decoverage if it continues until the issuance of the final C of O. *See* Coverage Regulations Section I(E)(3); *In the Matter of the Application of Milne*, Loft Board Order No. 114 (August 29, 1984).

Thus the sole retroactive application that could possibly affect the coverage determination itself is that of the 1987 amendment to Article 7-C, M.D.L. Section 281(4), which might permit coverage even though certain requirements of the applicable zoning law were not met. However, in light of the compliance with the Zoning Resolution, it is thus unnecessary to address the tenants' arguments as to the applicability of the this amendment to Article 7-C.

In opposition to the implementation of Article 7-C to this particular building, the owner has raised a host of constitutional objections, including arguments that application of the statute would constitute an undue burden on state commerce, involuntary servitude, denial of due process, and denial of equal protection. In addition, the owner raised the equitable defense of estoppel. The constitutionality of Article 7-C has already withstood most of the attacks now raised by the owner. *See Spring Realty Co. v. New York City Loft Board*, 69 N.Y.2d 657 (1987), *cert. denied*, __ U.S. __ (1987). In any case, as the hearing officer properly held, these constitutional and equitable issues cannot be adjudicated by the Loft Board since they lie outside its limited jurisdiction to

implement and enforce Article 7-C. For that reason, all of the owner's constitutional and equitable objections and defenses must be dismissed.

Behind the bluster of the owner's voluminous constitutional and procedural challenges to coverage lies the indisputable fact that the owner's conduct and statements, from 1978 when it purchased the building until at least 1982, expressly recognized the residential use of the upper eight floors. During this time, according to the credible and unrebutted testimony of nearly all the tenants, the owner was leasing the space for "lofts" and even had some tenants (specifically Ms. Eshel) fill out application forms asking about roommates and pets, hardly items of concern for commercial tenancy. At the same time the owner's employees were personally assuring tenants that it was not only acceptable but preferable for them to live in the building, going so far as to approve floor plans for kitchens and bathrooms, recommend electricians and plumbers, and help procure homeowner's insurance.

Along with this conduct, the owner retained an architect in 1978 to commence a series of proceedings with the Department of Buildings, the Board of Standards and Appeals, and finally the City Planning Commission to legalize the building for residential use. In 1982, the owner stated in an application to City Planning that, since 1976, it had completely failed to find conforming use tenants, an admission that the present occupants were non-conforming and, presumably, residential. In support of this same application, the owner supplied documentary proofs solicited directly from the tenants, that most of the building was occupied residentially as of September 1, 1980. Given these clear acknowledgments of

the residential use of the building from 1978 continuing throughout 1980 and 1981, it is difficult, indeed, to see how the owner can now contest the tenants' coverage application on the grounds of inadequate proofs. In truth, the past statements of the owner are the strongest evidence possible of residential occupancy.

Turning to the actual evidence of residential occupancy with this in mind, it becomes clear that the proofs of most of the units, buttressed as they are both by the admissions of the owner, and adequate documentation,* are more than sufficient to establish residential occupancy for the entire window period. Thus, the credible testimony concerning units 2W, 2WB, 3W, 4E, 5W, 5E, 6E, 6WB, 6WF, 7E, 7W, 7C, 8W, and 9W establishes that these units were residentially occupied from April 1, 1980, until December 1, 1981. Two other units, 2E and 8E, which, according to the proofs and credible testimony offered, were occupied residentially before April 1, 1981, through December 1, 1981, constitute accreted units and are also found to be covered by Article 7-C pursuant to M.D.L. Section 281(3).

Three units, 3E, 8C and 9E, present a slightly closer question. Not only did the window period occupants of these units fail to testify at the hearings, but little or no documentary evidence was presented to buttress the other tenants' testimony concerning 1980-1981 residential use. Even though seven tenants and Ms. Diether all testified that they visited Richard

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* The owner's attacks upon the documentation as either inadequate (in the case of certain tenants who failed to produce tax returns) or hearsay (in the case of utility records) are less than convincing. In any event, except as discussed above, any deficiencies in documentation have been remedied by the credible testimony of the tenants themselves.

Yoder in unit 3E at various times between 1978 and 1985 and knew he resided there with his family, up until the time of the hearing, Mr. Yoder did not testify nor were any documents presented to support a claim of residential use. Likewise, the evidence of the residential occupancy of 8C by Luis Cavello, the alleged building superintendent, consisted solely of the testimony of ten tenants who visited him at various times in 1980, 1981, and 1982. And similarly, although four tenants recalled visiting unit 9E in 1980 when Michael Giovanni lived there, neither Mr. Giovanni's testimony nor any documentary proofs were offered to support this claim. Nevertheless, it is found that the tenants' testimony, which is found to be credible, when considered in light of the owner's admissions of the residential use of the entire building for this period, is sufficient to establish that these three units were residentially occupied for the entire window period, in the case of 3E, or as accreted units from April 1, 1981, until December 1, 1981, in the case of 8C and 9E, and are therefore also found to be covered.

Finally, as to units 4WF and 4WR, an analysis of the conflicting testimony makes it apparent that only unit 4WR can be covered. Three tenants testified that 4W was initially lived in by Allen Barr, who vacated in March 1980. According to the testimony of Mr. Gleizer, he then residentially occupied 4WF from May 1980 up until May 1981, when he sublet the space from May 1981 until May 1982 to Bruce Jope, who Mr. Gleizer testified used the space as an office while he continued to live in Wilmington, Massachusetts. Even though Mr. Gleizer indicated that Mr. Jope might have stayed in 4WF occasionally for two or three days at a time, he stated that the residence of Mr. Jope continued to be Massachusetts. Although other aspects of Mr. Gleizer's testimony with regard to the rear unit

are found not to be credible, as discussed below, his testimony as to the window period occupancy of 4WF, is found to be credible and, since this was the sole evidence adduced on this factual issue during the hearings, unit 4WF is found *not* to have been residentially occupied during the window period and the coverage application as to this unit must be denied.

As to 4WR, Mr. Gleizer testified that he sublet this unit to Charles Gifford from May 1980 until March 1982. Mr. Gleizer denied that Mr. Gifford lived in 4WR. However, in light of Mr. Gifford's testimony as well as that of one other tenant, Mr. Gleizer's denials of residential use are found not to be credible. Instead, based upon the credible testimony of Mr. Gifford and Mr. Hinman, unit 4WR is found to have been residentially occupied throughout the window period and therefore must also held to be covered.

There exists one further issue concerning 4WR which requires adjudication. At the hearing and in his post-hearing submissions, Mr. Gleizer insists that he, rather than Juliet Holland, the tenant since June 1, 1982, is the residential occupant entitled to protection. Ms. Holland denies that Mr. Gleizer has any rights to the unit, credibly testifying that she has lived in the unit since approximately June 1, 1982.* Under the Board's subletting regulations, where the present residential occupant took possession prior to June 21, 1982, as Ms. Holland did, she is the occupant qualified for Article 7-C protection. Subletting Regulations Section B(1) and (2). Thus,

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* Although Mr. Gleizer argues that Ms. Holland resided in Connecticut not New York, he has raised at most, an issue of primary residence which is not relevant to a coverage proceeding. *See Bor Realty Corp. v. New York City Loft Board*, __ N.Y. 2d __ (September 8, 1987).

Juliet Holland and not Mr. Gleizer must be found to be the protected occupant of unit 4WR.*

Turning finally to the owner's and Mr. Gleizer's procedural arguments as to improprieties in the procedures followed in resolving the case, none of the contentions made, even if true, rise to the level of due process violations. The owner argues that the new hearing officer, assigned to this case in July 1987 upon the departure of the hearing officer who presided over the 1985 hearings, is unqualified to make recommended credibility findings. However, it is well-settled that the constitutional right to due process and a fair hearing "does not require that the actual taking of evidence be before the same officer who makes the final determination." *Rothkoff v. Ratner*, 104 Misc. 2d 204, 206, 428 N.Y.S. 2d 138, 140 (N.Y. Co. S. St., 1980). The only essential requirement is that the officer who makes the decision review all of the evidence. *Id.* Mr. Spooner, the hearing officer who prepared the proposed opinion and order in this case upon Ms. Kornhauser's departure from the office, reviewed the entire case file, including documents and tapes of hearing testimony, and conferred with Ms. Kornhauser. He is thus capable of making the final credibility and legal determinations necessary for resolution of the case.**

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* Although the applicants seek an adjudication of the protected occupant status for each applicant, this is an issue which the Board has indicated will be adjudicated only when necessary and not as an attendant ruling of every coverage case. *See In the Matter of the Application of William Muschel*, Loft Board Order No. 33 at pp. 12-13 (November 23, 1983). Moreover, since all of the protected occupant disputes, with the exception of 4W, have been withdrawn, universal protected occupant determinations seem unnecessary.

** The owner's request for a copy of the hearing officer's recommended

(Footnote continued)

Appendix P

Mr. Gleizer argues that he was denied due process by the lack of notice of the hearings and was therefore unable to cross-examine some witnesses at all and unprepared to cross-examine Mr. Gifford. First of all, Mr. Gleizer was present at the conference when the original hearing dates were set. It was apparent at that time that, because of the large number of parties and attorneys concerned, the hearing officer could not possibly send out written notices each time a new hearing date was set or adjourned and reset. Rather, it was the parties' obligation to keep informed of the entire hearing schedule. As to the supposed "other witnesses" Mr. Gleizer was unable to cross-examine, Mr. Gleizer made no attempt to recall any of tenants who had already testified or, indeed, to call any witnesses whatsoever to support his claims as to 4WF and 4WR. It is thus Mr. Gleizer's failure to even attempt to call any witnesses, rather than any failure of notice of other hearing dates, which is responsible for the absence of evidence as to his unit. In any case, Mr. Gleizer was clearly informed of the days testimony was taken on 4WF and 4WR, since he was present on all of these days. Having been present on these days, he cannot now complain about deficiency of notice.

Mr. Gleizer's insistence that he was denied a fair opportunity to cross-examine Mr. Gifford is also meritless. The truth is that Mr. Gleizer conducted a lengthy and thorough cross-examination of Mr. Gifford concerning most of the topics testified to on direct. Only once did he make specific reference to a document which he needed to conduct his cross-

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findings must also be denied since these findings are internal agency communications, preliminary to the actual resolution of the case. Both parties will receive copies of the final order, which is all the Board's procedural regulations require.

examination, and this was supplied by Ms. Carson. The record thus belies his claim that he was somehow "unprepared." As to Mr. Gleizer's contention that he intended to retain an attorney to cross-examine Mr. Gifford at some future time, it need only be pointed out that Mr. Gleizer had several years to retain an attorney and thereby waived any right to complain about lack of legal representation.

Thus, because 640 Broadway meets the statutory criteria of an "interim multiple dwelling," in that at least three units were residentially occupied during the window period, it is found to be covered by Article 7-C, with units as described above.

ORDER:

It is hereby ordered that Docket No. TR-0092 is granted to the extent that 640 Broadway is determined to be an interim multiple dwelling consisting of 20 units: 2E, 2W, 2WB, 3E, 4E, 4WR, 5E, 5W, 6E, 6W, 6WR, 7E, 7W, 7C, 8E, 8W, 8C, 9E, and--. The owner is ordered to register the premises as an IMD with the Loft Board accordingly. Continued coverage of the premises is contingent upon the granting of a special permit by the Planning Commission.

It is further ordered that Docket No. TR-0092 is denied as to unit 4WF.

It is further ordered that Juliet Holland is protected occupant of Unit 4WR.

It is further ordered that Docket No. TR-0365 is hereby dismissed with prejudice.

Appendix P

DATED: April 28, 1988

Date Loft Board Order Mailed: May 10, 1988

/s/

Members Concurring: Chairman Dole; Cooke; DeLaney; Navare, Nemaizer (5)

Members Dissenting: Liebman (1)

Members Absent: Iacobazzo; Martinez (2)

NOTICE

A party aggrieved by a determination of the Loft Board may file an application for reconsideration of a determination within thirty (30) days of service of the determination on the parties (i.e., said application must be received at the Board offices within 30 days of the date the Order was mailed as indicated above). The Board, may in its discretion, reconsider such determination.

Filing of an application for reconsideration shall not toll the statute of limitations for purposes of initiating an Article 78 proceeding.